DOCKET

No. 08-1151

Title:	Stop the Beach Renourishment, Inc., Petitioner v. Florida Department of Environmental Protection, et al.
Docketed:	March 17, 2009
Lower Ct:	Supreme Court of Florida
Case Nos.:	(SC06-1447, SC06-1449)
Decision Date:	September 29, 2008
Rehearing Denied:	December 18, 2008

Questions Presented

Date	Proceedings and Orders
Mar 13 2009	Petition for a writ of certiorari filed. (Response due April 16, 2009)
Mar 26 2009	Order extending time to file response to petition to and including April 30, 2009, for all respondents.
Apr 15 2009	Motion for leave to file amicus brief filed by Pacific Legal Foundation.
Apr 30 2009	Brief of respondent Florida Department of Environmental Protection in opposition filed.
Apr 30 2009	Brief of respondents Walton County, and City of Destin in opposition filed.
May 12 2009	DISTRIBUTED for Conference of May 28, 2009.
May 12 2009	Reply of petitioner Stop the Beach Renourishment, Inc. filed. (Distributed)
Jun 1 2009	DISTRIBUTED for Conference of June 4, 2009.
Jun 8 2009	DISTRIBUTED for Conference of June 11, 2009.
Jun 15 2009	Motion for leave to file amicus brief filed by Pacific Legal Foundation GRANTED.
Jun 15 2009	Petition GRANTED.
Jun 30 2009	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including August 13, 2009.
Jun 30 2009	The time within which to file respondents' briefs on the merits is extended to and including September 28, 2009.
Jul 7 2009	Consent to the filing of amicus briefs, in support of either or of neither party, received from counsel for the respondent.
Jul 7 2009	Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for the petitioner.
Aug 13 2009	Joint appendix filed. (Statement of costs received.)
Aug 13 2009	Brief of petitioner Stop the Beach Renourishment, Inc. filed.
Aug 19 2009	Brief amicus curiae of Oregonians in Action Legal Center filed.
Aug 19 2009	Brief amici curiae of Cato Institute, et al. filed.
Aug 20 2009	Brief amicus curiae of Eagle Forum Education & Legal Defense Fund filed.
Aug 20 2009	Brief amicus curiae of Citizens for Constitutional Property Rights Legal Foundation, Inc. filed.
Aug 20 2009	Brief amici curiae of National Association of Home Builders, et al. filed.
Aug 20 2009	Brief amicus curiae of Center for Constitutional Jurisprudence filed.
Aug 20 2009	Brief amici curiae of Save Our Beaches, et al. filed.
Aug 20 2009	Brief amicus curiae of New Jersey Land Title Association filed.
Aug 20 2009	Brief amicus curiae of American Civil Rights Union filed.

Aug 20 2009	Brief amicus curiae of Save Our Shoreline filed.
Aug 20 2009	Brief amicus curiae of Coalition for Property Rights, Inc. filed.
Aug 20 2009	Brief amicus curiae of New England Legal Foundation filed.
Sep 4 2009	Motion for leave to file amicus brief out of time filed by Owners' Counsel of America.
Sep 25 2009	Brief amicus curiae of Brevard County, Florida filed. (Distributed)
Sep 28 2009	SET FOR ARGUMENT ON Wednesday, December 2, 2009.
Sep 28 2009	Brief of respondents Florida Department of Environmental Protection, et al. filed. (Distributed)
Sep 29 2009	CIRCULATED
Oct 5 2009	Motion for leave to file amicus brief filed by Owners' Counsel of America out of time GRANTED.
Oct 5 2009	Brief amicus curiae of United States filed. (Distributed)
Oct 5 2009	Brief amicus curiae of Surfrider Foundation filed. (Distributed)
Oct 5 2009	Brief amicus curiae of Coastal States Organization filed. (Distributed)
Oct 5 2009	Brief amici curiae of California, et al. filed. (Distributed)
Oct 5 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Oct 5 2009	Brief amici curiae of Florida Shore and Beach Preservation Association, et al. filed. (Distributed).
Oct 5 2009	Brief amici curiae of American Planning Association, et al. filed. (Distributed).
Oct 5 2009	Brief amicus curiae of National Association of Counties, et al. filed. (Distributed)
Oct 20 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 27 2009	Reply of petitioner Stop the Beach Renourishment, Inc. filed. (Distributed)
Nov 5 2009	Record received from Supreme Court of Florida. (1 box)
Dec 2 2009	Argued. For petitioner: D. Kent Safriet, Tallahassee, Fla. For respondents: Scott D. Makar, Solicitor General, Tallahassee, Fla.; and Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.)

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
MAR 13 2009
OFFICE OF THE CLERK

No. 08-1151

In The
Supreme Court of the United States

STOP THE BEACH
RENOURISHMENT, INC.,
Petitioner,

v.

FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
THE BOARD OF TRUSTEES OF THE
INTERNAL IMPROVEMENT TRUST FUND,
WALTON COUNTY, and CITY OF DESTIN,
Respondents.

On Petition for Writ of Certiorari
to the Florida Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Florida Supreme Court invoked "nonexistent rules of state substantive law" to reverse 100 years of uniform holdings that littoral rights are constitutionally protected. In doing so, did the Florida Court's decision cause a "judicial taking" proscribed by the Fifth and Fourteenth Amendments to the United States Constitution?

Is the Florida Supreme Court's approval of a legislative scheme that eliminates constitutional littoral rights and replaces them with statutory rights a violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution?

Is the Florida Supreme Court's approval of a legislative scheme that allows an executive agency to unilaterally modify a private landowner's property boundary without a judicial hearing or the payment of just compensation a violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution?

LIST OF PARTIES

Petitioner

Stop the Beach Renourishment, Incorporated is the sole Petitioner and is not publicly traded.

Respondents

Florida Department of Environmental Protection; The Board of Trustees of the Internal Improvement Trust Fund; Walton County, Florida; and the City of Destin, Florida.

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The Opinion of the Supreme Court of Florida, *Walton County v. Stop the Beach Renourishment, Inc.*, Nos. SC06-1447 and SC06-1449, 998 So. 2d 1102 (Fla. 2008), *entered* Sept. 28, 2008, is reprinted in the Appendix at App. 1.

The Order of Florida Supreme Court Denying Motion for Rehearing, *Walton County v. Stop the Beach Renourishment, Inc.*, Nos. SC06-1447 and SC06-1449, 998 So. 2d 1102, *entered* Dec. 18, 2008, is reprinted in the Appendix at App. 136.

The unpublished order granting certification of the Florida First District Court of Appeal, *Save Our Beaches, Inc. v. Florida Department of Environmental Protection*, No. 1D05-4086, 31 Fla. L. Weekly D1811, 2006 WL 1112700 (Sept. 29, 2006), *entered* July 3, 2006, is reprinted in the Appendix at App. 59.

The unpublished opinion of the Florida First District Court of Appeal, *Save Our Beaches, Inc. v. Florida Department of Environmental Protection*, No. 1D05-4086, 31 Fla. L. Weekly D1173, 2006 WL 1112700 (July 7, 2006), *entered* Apr. 28, 2006, is reprinted in the Appendix at App. 61.

The unpublished Final Order of the Florida Department of Environmental Protection Final Order, *Save Our Beaches, Inc. v. Florida Department of Environmental Protection*, Final Order No. DEP:05097871, DOAH Case Nos. 04-2960 and 04-

3261, DEP No. 04-1370, *entered* July 27, 2005, is reprinted in the Appendix at App. 88.

The unpublished Recommended Order of the Florida Division of Administrative Hearings, *Save Our Beaches, Inc. v. Florida Department of Environmental Protection*, Nos. 04-2960 and 04-3261, 2005 WL 1543209, 05:194 Envtl. & Land Use Admin. L. Rep. 3 (Jan. 1, 2006), *entered* June 30, 2005, is reprinted in the Appendix at App. 101.

JURISDICTION

This Court has jurisdiction to review the Opinion of the Florida Supreme Court on a Petition for Writ of Certiorari pursuant to 28 U.S.C. Section 1257. The Florida Supreme Court's Opinion was entered on September 29, 2008. On December 18, 2008, the Florida Supreme Court denied Petitioner Stop the Beach Renourishment, Inc.'s Motion for Rehearing. This Petition for Writ of Certiorari is timely filed within 90 days from that date. Sup. Ct. R. 13.

This Petition presents two bases for certiorari review under Supreme Court Rule 10. Initially, the Florida Supreme Court's decision conflicts with the Ninth Circuit's decision in *Robinson v. Ariyoshi*, 753 F.2d 1468, 1474 (9th Cir. (Haw.) 1985), *rev'd on procedural grounds*, *Ariyoshi v. Robinson*, 477 U.S. 902 (1986). *See* Sup. Ct. R. 10(b). This case also presents "an important question of federal law that has not been, but should be, settled by this Court." *See* Sup. Ct. R. 10(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment of the United States Constitution provides:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The remaining citations to state statutes are lengthy and their text is set forth in the Appendix.

STATEMENT OF THE CASE

For 100 years it has been a bedrock principle of Florida law that owners of littoral property had constitutionally protected property rights in the direct access to the ocean and the right to accretion.[1] Over this 100 year period, Florida law has required landowners to own to the Mean High Water Line ("MHWL") to be a littoral owner and possess such rights.[2]

Now, in its rush to restore "critically eroded" beaches, the legislative and executive branches of the State of Florida have decided to sever an oceanfront property owner's contact with the ocean by unilaterally altering and replacing the MHWL as the property boundary for a 6.9 mile stretch of beach with a fixed "Erosion Control Line" ("ECL"). This 6.9

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[1] The term "riparian" technically refers to property adjacent to a river or stream, and the term "littoral" refers to property adjacent to an ocean, sea, or lake. However, Florida courts have generally used the term "riparian" to describe all uplands adjacent to any navigable water. *See Board of Trustees v. Sand Key Assoc., Ltd.* (*Sand Key*), 512 So. 2d 934, 936 (Fla. 1987). While the courts below have used both of these terms to discuss the rights involved in this case, Stop the Beach Renourishment, Inc. ("STBR") will attempt to use the term littoral throughout this Petition when possible.

[2] Not one Florida Supreme Court case in 100 years – until now – has ever questioned or called this law into doubt. *See, e.g., Sand Key*, 512 So. 2d at 936; *Belvedere Dev. Corp. v. Dep't of Transp.*, 476 So. 2d 649, 652 (Fla. 1985); *State v. Fla. Nat'l Prop., Inc.*, 338 So. 2d 13, 17 (Fla. 1976); *Brickell v. Trammell*, 82 So. 221, 227 (Fla. 1919); *Thiesen v. Gulf, Fla. & Ala. Ry. Co.*, 78 So. 491, 507 (Fla. 1917); *Broward v. Mabry*, 50 So. 826, 830 (Fla. 1909).

mile property boundary modification was accomplished through the simple recording of a single survey (affecting 453 individual properties, 5 of which belong to Petitioner's members)[3] with no judicial approval required. The scheme of the Beach and Shore Preservation Act, Chapter 161 of the Florida Statutes (2003) (hereinafter "Act"),[4] further results in a complete elimination of some of the 100 year old littoral property rights and replaces them with statutory rights without any judicial proceeding or compensation.

The Florida Supreme Court has blessed this scheme by simply announcing that those ancient littoral rights never existed so the State does not have to pay compensation. The Florida Supreme Court further failed to require the commencement of eminent domain proceedings as a result of a 6.9 mile property boundary change (that modified 5 deeds and likely 448 more) as expressly required by the Act. Fla. Stat. § 161.141 (2003).

This case began in 2003, when the City of Destin ("City") and Walton County ("County")[5]

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[3] App. 84, 215.

[4] The original petition for administrative hearing filed in this case challenged the Act and implementing regulations as such existed in 2003, and all citations in this petition will be to the 2003 versions; however, neither the statute nor the regulations have been subsequently amended in a manner relevant to this petition. *See generally* Fla. Stat. ch. 161 (2008); Fla. Admin. Code Ann. ch. 18-21 (2008).

[5] The City and County may hereafter be referred to collectively as the "Applicants."

sought approval to restore 6.9 miles of beach and dunes after several hurricanes "eroded" the beaches in the City and County. The City and County applied for a Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands (collectively "JCP") from the Florida Department of Environmental Protection ("DEP") to place sand landward and seaward of the MHWL as authorized by the Act.

Pursuant to the Act, once an applicant decides to move forward with a beach restoration project contemplated by DEP's beach management plan, the Board of Trustees of the Internal Improvement Trust Fund ("Board of Trustees") is required to conduct a survey of the beach in order to locate the ECL.[6] Following a "public hearing" regarding the proposed location of the ECL,[7] the Board of Trustees is required to approve an ECL for a project.[8]

The Act further requires recordation of the survey of the ECL in the official records of the appropriate county.[9] In addition, and most importantly, the Act provides that upon recording of the survey and ECL:

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[6] Fla. Stat. § 161.161(3) (2003).

[7] Members of the public are only allowed "to submit their views concerning the precise location of the proposed erosion control line." *Id.* at § 161.161(4).

[8] *Id.* The resolutions approving the ECL for the City and the County were adopted on December 30, 2004, and June 25, 2004, respectively. *See* App. 112.

[9] *See generally* Fla. Stat. § 161.181.

> **title to all lands seaward of the erosion control line shall be deemed to be vested in the state by right of its sovereignty**, and title to all lands landward of such line shall be vested in the riparian upland owners whose lands either abut the erosion control line or would have abutted the line if it had been located directly on the line of mean high water on the date the board of trustees' survey was recorded.[10]

The legislative/executive establishment and recording of the ECL survey thus changes the property boundary of all 453 landowners within this project without a quiet title action or even judicial approval, much less compensation. App. 84. This boundary change separates oceanfront property from the ocean.

By doing so, the establishment of the ECL divests the upland riparian property owner of **all** common law littoral rights.[11] Specifically, with respect to the littoral right to accretion, the Act states that once the ECL is established "the common law shall no longer operate to increase or decrease the proportions of any upland property lying

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[10] *Id.* at § 161.191(1) (emphasis added).

[11] *Id.* at § 161.191(2).

landward of such line, either by accretion or erosion or by any other natural or artificial process . . . ."[12]

As discussed in Section I.A., *infra*, it has always been an essential element of Florida property law that the owners of littoral property have the exclusive right to directly access navigable water from their property as well as the title to any accreted land – meaning that the littoral owner has always maintained access to the ocean regardless of any accretion or erosion.[13] By changing the property boundary to a fixed ECL, rather than the flexible MHWL, littoral owners have been divested of their rights to exclusive access and accretion, among other littoral rights.

After providing that the ECL severs all littoral rights from the uplands, the Act attempts to replace these constitutional property rights with **similar but inferior** (*i.e.*, lacking constitutional protection) statutory rights.[14] Moreover, the Act,

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[12] *Id.*

[13] *Board of Trustees v. Medeira Beach Nominee, Inc.*, 272 So. 2d 209, 214 (Fla. 2d DCA 1973) (holding beachfront owners "have the exclusive right of access over their own property to the water.").

[14] Section 161.201 of the Florida Statutes states in part:

> Any upland owner or lessee who by operation of ss. 161.141-161.211 ceases to be a holder of title to the mean high-water line shall, nonetheless, continue to be entitled to all common-law riparian rights except as otherwise provided in s. 161.191(2), including

acknowledging that establishing an ECL in connection with a beach restoration project can result in a taking of constitutionally protected littoral property rights, expressly provides that "[i]f an authorized beach restoration . . . project cannot reasonably be accomplished without the taking of private property, the taking must be made by the requesting authority by eminent domain proceedings."[15] This provision, however, relies upon a court for enforcement. In this case, the Florida Supreme Court not only sanctioned an uncompensated taking but created one as a result its invocation of "nonexistent rules of substantive state law."

Given the effect of the Act on its members' property rights, Stop the Beach Renourishment, Inc. ("STBR")[16] filed an administrative petition challenging DEP's Notice of Intent to Issue the JCP and adoption of the ECL. App. 63. The administrative challenge centered on whether littoral rights were "unreasonably infringed" by the JCP and ECL such that the Applicants would have to provide "sufficient evidence of upland interest" to be entitled to a JCP.[17]

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but not limited to rights of ingress, egress, view, boating, bathing, and fishing.

[15] Fla. Stat. § 161.141 (2003).

[16] Stop the Beach Renourishment, Inc., is a Florida not for profit corporation with six members who all own riparian property within the proposed project.

[17] *See generally* Fla. Admin. Code Ann. r. 18-21.004(3)(b) (2003).

The determination of whether littoral rights were infringed necessarily included a determination of whether littoral rights were eliminated and taken by the Act. Thus, STBR also challenged whether the JCP and ECL would: 1) deny upland owners their legitimate and constitutional use and enjoyment of their properties; and 2) result in a taking. *Id.* While these two issues were not (and could not be) decided in the administrative hearing by the Administrative Law Judge ("ALJ") or DEP, the First District Court of Appeal did decide these issues.

A unanimous panel of the First District Court of Appeal found the case relatively simple – given well-established Florida law – and held that the adoption of the ECL resulted in an uncompensated taking of littoral rights and invalidated the ECL. *Id.* at 85-87.

While the Florida Supreme Court's majority opinion recognizes that "Florida case law has clearly defined littoral rights as constitutionally protected private property rights," it then states that "the exact nature of these rights rarely has been described in detail." *Id.* at 18. The majority then "redefines" the littoral rights to accretion and access (which necessarily includes the right to maintain contact with the MHWL) in such "detail" to conclude that the rights never existed in the first instance.[18]

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[18] As noted below, the Act and the majority's opinion allow for the complete elimination of **all** littoral rights and replacement with inferior statutory rights, which is a wholesale violation of the United States Constitution. *See infra*.

Specifically, the majority redefined the littoral right to accretion as "a *contingent, future interest* that only becomes possessory if and when land is added to the upland by accretion or reliction." *Id.* at 20 (emphasis added). With this "new" definition, the majority concludes that the littoral right of accretion is not "implicated" or "applicable." *Id.* at 33-35. The majority further attempted to justify the elimination of the right to accretion stating the need for the right no longer exists because the Act statutorily solves the same problem that the rights of accretion and reliction were created to solve. *Id.* at 35.

Regarding the littoral right to have the upland remain in contact with the water (or MHWL), the majority stated "[w]e have never addressed whether littoral rights are unconstitutionally taken based solely upon the loss of an upland owner's direct contact with the water." *Id.* at 36. The majority then holds for the first time, contravening a century of common law, that the constitutional right to have upland property remain in contact with the MHWL is "ancillary" to and a subset of the right of access, and that "under Florida common law, there is no independent right of contact with the water." *Id.*

The dissent found this holding especially troublesome and plainly disingenuous because the entire body of Florida law – common, statutory, and constitutional – unequivocally states that the right to have one's property remain in contact with the MHWL is a condition precedent for a landowner to have littoral rights. *Id.* at 43-47.

The majority does not discuss in detail the elimination of other littoral rights, but conclusively finds that the Act on its face does not result in a taking of littoral rights under the Florida Constitution or the United States Constitution.[19] The majority does not explain how a statutory right can replace a constitutional right.

The majority also failed to address the constitutionality of the Act's provisions that allow the boundary of a private property to be unilaterally changed by an executive branch agency recording an ECL survey.[20] The majority merely found it was a "reasonable" solution to a public policy problem.[21] *Id.* at 12.

One dissenting Justice, however, did not mince words in explaining what the majority had done in this case:

> I cannot join the majority because of the manner in which it has "butchered"

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[19] In its Motion for Rehearing, STBR argued that the legislative substitution of statutory rights for constitutional rights violates the United States Constitution. App. 141-42, 155-58.

[20] The Amicus Brief filed by Pacific Legal Foundation thoroughly argued and explained how the setting of the ECL, in and of itself, was a physical taking under the United States Constitution. *Id.* at 191-202.

[21] The First District Court of Appeal found that to the extent the legislative alteration of a private property owner's boundary was contrary to the owner's deed effected an unconstitutional taking and invalidated the ECL to any such properties. *Id.* at 81-84, 86-87.

> Florida law in its attempted search for equitable answers to several issues arising in the context of beach restoration in Florida. In attempting to answer these questions, the majority has, in my view, unnecessarily created dangerous precedent constructed upon a manipulation of the question actually certified. Additionally, I fear that the majority's construction of the Beach and Shore Preservation Act is based upon infirm, tortured logic and a rescission from existing precedent under a hollow claim that existing law does not apply or is not relevant here. Today, the majority has simply erased well-established Florida law without proper analysis . . . .

Id. at 41-42.

Following the Florida Supreme Court's ruling, STBR filed a Motion for Rehearing arguing that the majority's decision itself violates the United States Constitution. Specifically, STBR argued that the Opinion and its effective reversal of 100 years of state common law constitute a taking under the United States Constitution. App. 140-148. STBR further argued that the wholesale elimination of all common law littoral rights by a changing of the property boundary from the MHWL to the ECL by the Act as authorized in the majority's opinion and the substitution of statutory rights violates the United States Constitution. *Id.* at 141.

The Florida Court denied STBR's Motion for Rehearing on December 18, 2008. *Id.* at 136.

REASONS FOR GRANTING THE WRIT

I. In invoking "nonexistent rules of state substantive law", the Florida Supreme Court reversed 100 years of uniform holdings that littoral rights are constitutionally protected common law property rights, and thus caused a "judicial" taking proscribed by the Fifth and Fourteenth Amendments to the United States Constitution

This case presents a unique opportunity for this Court to address an ever-increasing and important constitutional question as to whether a state court's ruling that eliminates long established common law property rights by declaring such rights "never existed" under state property law solely to avoid a takings claim is a "judicial taking."

A. The Florida Supreme Court's creation of "nonexistent rules of state substantive law"

The Florida Supreme Court, with its desired result in mind, overhauled 100 years of Florida common law in an attempt to analytically justify its holding. One need only read the first two paragraphs to see that the majority creatively reengineered the case so it could reach the desired result. Perhaps the most appalling "fiction" in the majority opinion, as discussed *infra*, is that the Act

can change the boundary of a littoral upland owner's property from the MHWL to the ECL, which change – according to the majority – has no legal significance or impact upon the landowner's constitutional rights.

Florida law regarding littoral rights, prior to this case was undisputed for 100 years. Even the majority recognized that "Florida case law has clearly defined littoral rights as constitutionally protected private property rights . . . ." App. 18. These well-recognized common law littoral rights possessed by upland owners include:

> (1) the right of access to the water, including the right to have the property's contact with the water remain intact; (2) the right to use the water for navigational purposes; (3) the right to an unobstructed view of the water; and (4) the right to receive accretions and relictions to the property.

Sand Key, 512 So. 2d at 936.

Instead of expressly deciding whether the Board of Trustees's action in recording an ECL under the Act that eliminates **all** constitutional littoral rights and substituting statutory rights for some of them is constitutional, the majority focused only on "redefining" the two littoral rights that the First District Court of Appeal expressly found were eliminated and taken.

Laying the foundation for this change of state law to achieve the desired result[22] and admitting 100 years of precedential cases have held that littoral rights are constitutionally protected, the majority states that "the exact nature of these rights rarely has been described in detail." *Id.* at 18. The majority seeks an end run around the law by redefining littoral rights in detail. After this exercise, the majority concludes that the two littoral rights, which the First District Court of Appeal determined were taken, were not true littoral rights in the first place.

1. The Redefined and Changed Littoral Right to Accretion

The majority redefines the littoral right to accretion by distinguishing it from other littoral rights so as to isolate it: "[t]he right to accretion and reliction is a *contingent, future interest* that only becomes a possessory interest if and when land is added to the upland by accretion or reliction." *Id.* at 20. Having defined the right to accretion as a "future" right, the majority then goes on to conclude that it is not "implicated" or "applicable," presumably because accretion will never happen in the future because the State will be under a

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[22] Recognizing the state of the law would not allow the State to proceed with the beach restoration project (in this case or any other project throughout the state) without a blatant taking of private property, the majority had to change the state of the law to reach its desired result, and did so – all while pretending it did not.

statutory duty to continually maintain the beach such that erosion or accretion does not occur.

The majority's emphasis on this newly "detailed" aspect (*i.e.*, "contingent future right") of the right to accretion is perplexing given its prior unequivocal holding in *State v. Florida National Properties, Inc.*, 338 So. 2d 13, 17 (Fla. 1976). In that case, – a case indistinguishable from the instant case – the Florida Supreme Court held a statute that attempted to permanently fix the boundary between upland and sovereign submerged lands (eliminating the Ordinary High Water Line as the boundary) unconstitutional because the fixed boundary took the riparian right to accretion without providing just compensation. *Id.* at 18-19 ("An inflexible meander demarcation line would not comply with the spirit or letter of our Federal or State Constitutions . . . .").

In *Florida National Properties, Inc.*, the Florida Supreme Court expressly recognized the nature of the littoral right to accretion was a future right: "the State, through the Trustees, claims not only the lands to which Plaintiff has already gained title through the operation of accretion and reliction, **but also seeks to deny to Plaintiff the right to acquire additional property in the future through the process of accretion and reliction**." *Id.* at 17 (emphasis added). Not only did the Florida Supreme Court recognize that the littoral right to accretion was a "future" right and a constitutionally protected right under the State and Federal constitutions, it held:

> By requiring the establishment of a fixed boundary line between sovereignty bottom lands and Plaintiff's riparian lands, Fla.Stat. s 253.151 . . . constitutes a taking of Plaintiff's property, **including its riparian rights to future alluvion or accretion**, without compensation in violation to the due process clause of the Fourteenth Amendment of the United States Constitution and the due process clause of . . . the Florida Constitution.

Id. (emphasis added).

Notwithstanding the wholesale failure to address this prior precedent, the majority fails to reconcile how a right that is expressly terminated by the Act is not "implicated." Left unanswered by the majority is what happens to the landowner's right to accretion, where it goes and who possesses this "future contingent right."[23]

The majority further attempted to justify the elimination of the right to accretion, stating there is no longer a "need" for the right because the Act statutorily solves the same problem that the common

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[23] The majority's rationale is even more surprising given that no party below argued this "not implicated" theory. Even the Board of Trustees admitted that the right to accretion was eliminated by the Act. The Board of Trustees argued that the taking should be analyzed under the regulatory taking test (as opposed to a physical taking test) and advocated that the right to accretion was worthless (thus no compensation was due).

law doctrines of accretion and reliction were created to solve. The "need" for a constitutional property right, however, does not support or justify its "elimination" by callously saying it is not "implicated."

For the majority to now suggest that the right to accretion has not been defined "in detail" is simply disingenuous and a sham,[24] as is its failure to acknowledge or overrule *Florida National Properties, Inc.*[25] As the dissent noted, prior case law is merely "an inconvenient detail of Florida legal precedent" to the majority. App. 45. It is this type of brazen disrespect for prior precedent and blatant rejection of 100 years of Florida property law to accomplish the majority's desired result that is repugnant not only to the senses but to the fundamental notions of justice, due process, and the sanctity of the United States Constitution. Accordingly, this Court should grant certiorari to firmly establish that a state court cannot by *ipse dixit* proclaim 100 years of property rights never really existed.

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[24] *See McCreary County, Ky. v. American Civil Liberties Union*, 545 U.S. 844, 865 (2005) (refusing to accept a governmental statement of purpose when it is "an apparent sham").

[25] *See Fla. Nat'l Prop., Inc.*, 338 So. 2d at 17 (holding that "the establishment of a fixed boundary line between sovereignty bottom lands and Plaintiff's riparian lands . . . constitutes a taking of Plaintiff's . . . **riparian rights to future alluvion or accretion**, without compensation in violation to the due process clause of the Fourteenth Amendment of the United States Constitution . . . ." (emphasis added)).

2. The Redefined and Changed Littoral Right of Contact with the MHWL

Regarding the littoral right to have the upland remain in contact with the water (or MHWL), the majority claims, "[w]e have never addressed whether littoral rights are unconstitutionally taken based solely upon the loss of an upland owner's direct contact with the water." *Id.* at 36. The majority then holds for the first time that the constitutional right to have upland property remain in contact with the MHWL is "ancillary," and a subset of the right of access, and that "under Florida common law, there is no independent right of contact with the water." *Id.*

The dissent found this holding especially troublesome and plainly disingenuous as the entire body of Florida law unequivocally holds that the right to have the property remain in contact with the MHWL is a condition precedent for a landowner to have littoral rights. *Id.* at 43-47. As noted by the dissent, a landowner's property must extend to the MHWL in order for common law littoral rights to even exist:[26]

> By essential, inherent definition, riparian and littoral property is that which is contiguous to, abuts, borders, adjoins, or touches water. In this State,

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[26] *See also Sand Key*, 512 So. 2d at 936 ("This Court has expressly adopted the common law rule that a riparian or littoral owner owns to the line of the ordinary high water mark on navigable waters.").

> the legal essence of littoral or riparian land is contact with the water. Thus, the majority is entirely incorrect when it states that such contact has no protection under Florida law and is merely some "ancillary" concept that is subsumed by the right of access. In other words, the land must touch the water as a condition precedent to all other riparian or littoral rights and, in the case of littoral property, this touching must occur at the MHWL.

Id. at 43-44 (footnotes and citations omitted).[27]

The majority does not dispute this contention; rather it simply ignores this fundamental condition of contact with the water that is precedent to the existence of ALL littoral rights.[28] If the upland

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[27] The dissenting opinion provides the following citations as authority for its position: "Brickell v. Trammel, 82 So. 221, 229-30 (Fla. 1919) (explaining that under Spanish civil law and English common law, private littoral ownership extended to the high-water mark); Miller v. Bay-to-Gulf, Inc., 193 So. 425, 427 (Fla. 1940) ("[I]t is essential that [the property owners] show the ordinary high water mark or ordinary high tide of the Gulf of Mexico extended to their westerly boundary in order for them to be entitled to any sort of [littoral] rights . . . ." (emphasis supplied)); Thiesen v. Gulf, Fla. & Ala. Ry. Co., 78 So. 491, 500 (Fla. 1918) ("At common law lands which were bounded by and extended to the high-water mark of waters in which the tide ebbed and flowed were riparian or littoral to such waters." (emphasis supplied))." App. 44 (emphasis in original).

[28] Even the Act itself acknowledges this principle in the very section the majority identifies as the saving grace of the Act:

property is separated from the MHWL, then the entire property is no longer littoral and the property is divested of **all** littoral rights.

While the majority states that the right to have the property remain in contact with the water is not an "independent" littoral right and is part of the littoral right to access, it does not explain whether the elimination of the littoral right of access (or a portion thereof) is an unconstitutional taking. Instead, the majority ignores that the littoral right of access has been completely eliminated and swapped with a statutory right of access concluding this swapping of rights is acceptable because "[d]irect access to the water is preserved under the Act." *Id.* at 38.

> Preservation of common-law rights.--Any upland owner or lessee *who by operation of ss. 161.141-161.211 ceases to be a holder of title to the mean high-water line* shall, nonetheless, continue to be entitled to all common-law riparian rights except [the right to accretion], including but not limited to rights of ingress, egress, view, boating, bathing, and fishing.

Fla. Stat. § 161.201, Florida Statutes (2003) (emphasis added); *see also* App. 36-40.

B. The Florida Supreme Court's Opinion is a "Judicial Taking"

The issue presented in this case, commonly referred to by scholars and courts as a "judicial taking," is not new to this Court. This principle was first identified by this Court as far back as 1897:

> In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment of the constitution of the United States, and the affirmance of such judgment by the high court of the state is a denial by that state of a right secured to the owner by that instrument.

Chicago Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 241 (1897).

Despite this clear holding, some later cases addressing this issue seem to contain language inconsistent with this holding and imply that state judiciaries are not limited by the takings or due process clauses of the United States Constitution. *See Great N. R.R. Co. v. Sunburst Co.*, 287 U.S. 358, 366-67 (1932); *Tidal Oil Co. v. Flanagan*, 263 U.S.

444, 450-51 (1924); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 680-81 & n.8 (1930).[29]

Thereafter, state courts began to rewrite or change long established state common law rules that defined property. When faced with public policy issues pitting public rights against private rights, state courts would conveniently change these background principles of state law and declare that the property rights being taken never existed; thus, no compensation was due to the landowner.[30] This creative legal exercise – which is epitomized by the Florida Supreme Court's decision in this case – is nothing more than a fiction used by activist courts to avoid takings claims.

Perhaps the most well known example of state courts using this fiction to resolve public policy concerns is *Hughes v. Washington*, 389 U.S. 290 (1967). In *Hughes*, Justice Stewart, in an concurring opinion, noted his fundamental concerns with state court rulings that suddenly change state property law decreeing no property exists only to avoid a taking for which the state must pay compensation. *Id.* at 295-97. After recognizing that a state "is free to make changes, either legislative or judicial, in its

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[29] None of these cases address or discuss the *Chicago Burlington* decision.

[30] *See, e.g.*, *Hughes v. Washington*, 389 U.S. 290 (1967); *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994); *State ex rel. Thornton v. Hay*, 462 P.2d 671 (1969); *Sotomura v. County of Hawaii*, 460 F.Supp. 473 (D.C. Haw. 1978); *Ultimate Sportsbar, Inc. v. United States*, 48 Fed. Cl. 540 (Fed. Cl. 2001); *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. (Haw.) 1985).

general rules of real property law, including the rules governing the property rights of riparian owners," Justice Stewart concluded that a state cannot "take [property] without just compensation." *Id.* at 295.

Justice Stewart opined that whether a "sudden change in state law, unpredictable in terms of the relevant precedents" could constitute a taking "inevitably presents a federal question" for determination by this Court. *Id.* at 296-97. In determining whether such a sudden change in law has occurred, Justice Stewart stated:

> For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.

Id.

Despite the Washington Supreme Court's attempt to finesse its way around prior precedent claiming it was distinguishable and that is decision was "not startling," Justice Stewart stated "I can only conclude, as did the dissenting judge below, that the state court's most recent construction of Article 17 [of its constitution] effected an unforeseeable change in Washington property law as

expounded by the State Supreme Court." *Id.* at 297.[31]

In finding the Washington Supreme Court's decision to change state property law to be a taking under the Due Process Clause of the Fourteenth Amendment, Justice Stewart eloquently stated the rationale:

> There can be little doubt about the impact of that change upon Mrs. Hughes: The beach she had every reason to regard as hers was declared

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[31] The dissenting justices of the Washington Supreme Court in *Hughes* – like Florida Supreme Court Justice Lewis in this case – could see the thinly disguised attempt to reach a desired public policy result:

> I find myself lost in admiration at the scholarship and erudition manifested in the majority opinion. However, all the legal signposts that I can read And [sic] understand point in the opposite direction, so I am compelled to dissent.
>
> * * *
>
> If this seems a ridiculously short and simple solution of the apparently complex problem with which the majority opinion deals, I can only say that it is the result dictated by common law . . . . It is [sic] plain and well-traveled legal path. To arrive at the result the state desires (and the majority approves), a new, circuitous and rather devious route, rarely explored, must be followed.

Hughes v. State, 410 P.2d 20, 30 (Wash. 1966) (Hill, J., dissenting).

> by the state court to be in the public domain. Of course the court did not conceive of this action as a taking. . . . But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does. Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property-without paying for the privilege of doing so. *Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment.*

Hughes, 389 U.S. at 297-298 (emphasis added). *See, e.g., Chicago Burlington & Quincy R.R. Co.*, 166 U.S. at 233-34, 241. ("But it must be observed that the prohibition of the [Fourteenth] amendment refer to all the instrumentalities of the state,- to its legislative, executive, and judicial authorities,- and therefore whoever, by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation by the state, 'violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state.'" (internal citation omitted)); *see also Muhlker v. New York & Harlem R.R. Co.*, 197 U.S. 544, 570-

71 (1905) (holding that the state judiciary has no more power to violate the Contracts Clause and deprive a litigant of property with impunity than does any other state actor).

Thereafter in 1980, this Court reversed the Florida Supreme Court based on this very notion and a unanimous court held:

> Neither the Florida Legislature by statute, **nor the Florida courts by judicial decree,** may accomplish the result the county seeks simply by recharacterizing the principal as "public money" because it is held temporarily by the court.
>
> To put it another way: a State, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980) (emphasis added).

More recently, Justice Scalia has voiced grave concerns over a state court's continued use of this property "fiction" to take private property. In the

dissenting opinion of *Stevens v. City of Cannon Beach*, Justice Scalia stated:

> just as a State may not deny rights protected under the Federal Constitution through pretextual procedural rulings, neither may it do so by invoking nonexistent rules of state substantive law. Our opinion in *Lucas*, for example, would be a nullity if anything that a state court chooses to denominate "background law"- regardless of whether it is really such- could eliminate property rights.

Stevens v. City of Cannon Beach, 510 U.S. 1207, 1207 (1994) (Scalia, J., and O'Connor, J., dissenting from denial of the petition for writ of certiorari) (citation omitted).

After citing with approval Justice Stewart in *Hughes* and the *Webb Fabulous Pharmacies* case, Justice Scalia concluded:

> Since opening private property to public use constitutes a taking, if it cannot fairly be said that an Oregon doctrine of custom deprived Cannon Beach property owners of their rights to exclude others from the dry sand, then the decision now before us has effected an uncompensated taking.

> To say that this case raises a serious Fifth Amendment takings issue is an understatement.

Id. (citations omitted).

Since *Stevens*, this Court has not discussed the judicial takings issue. During that time, state courts have become more aggressive in "invoking non-existent rules of substantive law" to deprive landowners of property. Since 1994, this Court has been presented with no less than 15 petitions for writs of certiorari asserting a judicial taking.[32] This violation of property owners' federally guaranteed rights is an ever-increasing problem that this Court will continue to face as the state courts become more brash.

Several federal courts have found judicial takings when a state court has suddenly and unexpectedly changed state common law to deprive landowners of property rights. In *Robinson v. Ariyoshi*,[33] the Ninth Circuit faced the question "Can the state, by a judicial decision which creates a major change in property law, divest property interests?" 753 F.2d at 1471. The Ninth Circuit concluded that the "short answer is no." *Id.* at 1473. In so holding, the Ninth Circuit recognized that a state may change it laws by judicial or legislative

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[32] The citations of these 15 petitions for certiorari are set forth in the Appendix on page 225-226.

[33] *Robinson v. Ariyoshi*, 753 F.2d 1468, 1474 (9th Cir. (Haw.) 1985), *rev'd on procedural grounds*, 477 U.S. 902 (1986).

action. The Ninth Circuit even recognized that it is within the Hawaii Supreme Court's authority to declare "after more than century of a different law, that the common law doctrine of riparian ownership was the law of Hawaii." *Id.* at 1473.

The Ninth Circuit, however, noted that application of this judicial change retroactively was a judicial taking under *Hughes*, 389 U.S. at 295, and a violation of the United States Constitution. *Robinson*, 753 F.2d at 1474. Accordingly, the Ninth Circuit held that the plaintiffs could not be divested of their vested rights without the payment of compensation. *Id.*[34] The Florida Supreme Court's refusal to find a taking, and indeed its actions that have created a direct taking, expressly conflict with the admonition of the Ninth Circuit creating a conflict under Supreme Court Rule 10(b).

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[34] *Accord Ultimate Sportsbar, Inc. v. United States*, 48 Fed. Cl. 540, 550 (Fed. Cl. 2001) (finding a "judicial taking occurs where a court's decision that does not even 'arguably conform[ ] to reasonable expectations' in terms of relevant law of property rights effects a 'retroactive transformation of private into public property.'" (alteration in original)); *Sotomura v. County of Hawaii*, 460 F.Supp. 473, 481 (D.C. Haw. 1978) ("The [Hawaii Supreme Court's] decision in Sotomura was contrary to established practice, history and precedent and, apparently, was intended to implement the court's conclusion that public policy favors extension of public use and ownership of the shoreline. A desire to promote public policy, however, does not constitute justification for a state taking private property without compensation. The Fourteenth Amendment to the Constitution forbids it.").

Judicial takings cases raise serious constitutional issues that have been seeking resolution by this Court since *Hughes*. This case presents the judicial taking issue in much narrower terms than the issue in *Hughes* or *Stevens*. In addition, this case provides a far better procedural vehicle to address the issues because *Stevens* had an inadequate factual record and involved a change to state law that occurred prior the filing of that case.[35] Here the factual record is complete and the state court modified the relevant state law principles in the course of this case for the purpose of depriving landowners any right to compensation. To say that the majority's manipulation of the relevant principles of state law is blatant is an understatement.

This Court should grant certiorari to halt the ever-increasing judicial nullification of private property rights by state courts (and especially the Florida Supreme Court) that "redefine" property rights to not exist under "background principles of state law" solely to accomplish public policy objectives that have no other purpose but to circumvent the Takings Clause of the United States Constitution. If a state court is free to "redefine" property interests so as to not exist, the Takings Clause no longer has a purpose or meaning. This case presents the perfect vehicle for the Court to address judicial takings.

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[35] *Stevens*, 510 U.S. at 1207.

II. The Florida Supreme Court's approval of a legislative scheme that eliminates constitutional littoral rights and replaces them with statutory rights violates the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution

The majority concluded that the Act can convert an oceanfront property with constitutionally protected littoral rights into an ocean-view property with statutory rights that mimic constitutional littoral rights and that this can be accomplished without effecting a taking. The majority's sole justification for the elimination of constitutionally protected littoral rights is Section 161.201 of the Florida Statutes, which provides statutory "replacement" rights. The majority simply concludes without any detailed analysis that a swapping of constitutional rights for statutory rights is "reasonable" and, thus, not unconstitutional. *See* App. 39-40.

It is impossible for a statute to "preserve" constitutional rights. Constitutional rights exist as a matter of constitutional law – not statutory law – and are protected by the Constitution itself. *Cooper v. Aaron*, 358 U.S. 1, 17-19 (1958) (holding constitutional rights cannot be nullified by action of state legislator, executive, or judicial officer); *Department of Revenue v. Kuhnlein*, 646 So. 2d 717, 721 (Fla. 1994) ("[N]either the common law nor a state statute can supersede a provision of the federal or state constitutions."); *Austin v. Christian*, 310 So. 2d 289, 293 (Fla. 1975) ("A statute enacted by the Legislature may not constrict a right

granted under the ultimate authority of the Constitution.").

This Court has previously articulated the basic principle that a legislature cannot eliminate a citizen's constitutional right and replace it with a statutory right. *Cooper*, 358 U.S. at 18-19 ("It is necessary only to recall some basic constitutional propositions which are settled doctrine" which includes that the Constitution is the supreme law of the land.). This principle equally applies to other constitutional rights such as the right to free speech, equal protection, the right to due process, the right to privacy, etc.

The Florida Supreme Court ignored this fundamental principle solely to accomplish its desired policy result. The state's attempt to strip a littoral property of **all** littoral rights, and replace those rights with statutory rights – which can be modified at the whim of the legislature and lack any protections – without compensation is patently unconstitutional. *See Ochoa v. Hernandez y Morales*, 230 U.S. 139, 161 (1913) ("Whatever else may be uncertain about the definition of the term 'due process of law,' all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."). Such an attempt is unconstitutional and a violation of the state and federal constitutions. *Cooper*, 358 U.S. 1; *Florida Nat'l Prop.*, 338 So. 2d at 17.

Unlike a littoral owners' ability to enforce its constitutional rights, the Act fails to provide any cause of action for the State's violation of any of the

limitations in Section 161.201 of the Florida Statutes, much less a cause of action that provides for just compensation if these replacement statutory rights are eliminated or reduced.

III. The Florida Supreme Court's approval of a legislative scheme that allows an executive agency to unilaterally modify a private landowner's property boundary without a judicial hearing or the payment of just compensation violates the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution

The ECL adopted by the Board of Trustees and recorded in this case extends along a 6.9 mile stretch of beach and crosses more than 453 individual properties. App. 215. Record evidence confirms that the STBR members' properties extended to mean high water line, *id.* at 84, (and presumably many of the other 448 properties as well).

As noted by the First District Court of Appeal – and not disputed by the Florida Supreme Court – the ECL will alter and change a littoral owner's property boundary from the MHWL to the ECL. *Id.* at 84. The First District Court of Appeal found this alteration patently unconstitutional. The Amicus Brief of the Florida Home Builders Association discussed the severe repercussions of allowing a single ECL survey recorded in the public records to alter the boundary lines of 6.9 miles of property resulting in unmarketable titles. *Id.* at 221-223.

The Florida Supreme Court simply ignored this serious due process concern conclusively stating that the Act and the fixing of the ECL was a "reasonable balance" between private and public rights. *Id.* at 40.

In so doing, the Florida Supreme Court overruled Florida's statutory and common law that has long held that constitutionally protected littoral rights cannot be severed from the littoral property. *See* Fla. Stat § 253.141(1) (2003) ("Riparian rights are those incident to land bordering upon navigable waters. . . . **They are appurtenant to and are inseparable from the riparian land**." (emphasis added)); *Belvedere Dev. Corp. v. Dep't of Transp.*, 476 So. 2d 649, 651 (Fla. 1985) ("[R]iparian rights are appurtenant to and inseparable from the riparian land." (citation omitted)). This long hailed rule stems from the fundamental definition of littoral rights that these rights only attach to upland property that borders the MHWL.[36] Accordingly, littoral rights cannot exist separate from the littoral upland.

Surprisingly, the Florida Supreme Court turned a blind eye toward the executive (and legislative) branch's 6.9 mile property boundary change.[37] Like

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[36] *Miller v. Bay-to-Gulf, Inc.*, 193 So. 425, 427 (Fla. 1940) ("[I]t is essential that [the property owners] show the ordinary high water mark or ordinary high tide of the Gulf of Mexico extended to their westerly boundary in order for them to be entitled to any sort of [littoral] rights . . . .").

[37] As such, all three branches of government of Florida have acted in concert – either directly or complicity – to deprive STBR's members' of their constitutional rights without just compensation.

the landowner in *Stevens*, STBR's members were not provided due process before their property boundary was unilaterally changed by the legislature and executive branch. The Board of Trustees did not file an action in the circuit court to quiet title to any property, and thus, no notice or hearing was provided to the landowners before their property boundaries were unilaterally altered as were their recorded deeds. In his dissent in *Stevens*, Justice Scalia concluded that the Supreme Court of Oregon's holding that the doctrine of customary use applied to Steven's property (modifying the ownership interest therein) as determined in a prior case to which Stevens was not a party violated fundamental due process:

> whether the Oregon Supreme Court chooses to treat it as having established a "custom" applicable to Cannon Beach alone, or one applicable to all "dry-sand" beach in the State, *petitioners must be afforded an opportunity to make out their constitutional claim by demonstrating that the asserted custom is pretextual.*

Stevens, 510 U.S. at 1207 (Scalia, J., and O'Connor, J., dissenting) (emphasis added).

In this case, deeds of the five members of STBR were altered, not by a judicial decree in which each member was a party, but by a survey filed by an executive agency. If this process is constitutional, there is nothing to stop the legislature from modifying eminent domain proceedings so as to no longer require

judicial oversight or approval.[38] To say that a due process violation has occurred is a serious understatement as due process would mean nothing under such an interpretation.

CONCLUSION

Perhaps the dissenting opinion of Justice Wells, provides the most succinct analysis of the case:

> It appears to me that this Court's precedent controlling this case is in State v. Florida National Properties, Inc., 338 So. 2d 13 (Fla. 1976); Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Associates, Ltd., 512 So. 2d 934 (Fla. 1987); and Belvedere Development Corp. v. Department of Transportation, 476 So. 2d 649 (Fla. 1985).
>
> There can be no doubt that beach restoration is of critical and vital interest in Florida. **However, the legislative setting of this erosion control line does eliminate valuable property rights which have been recognized by this Court.** Thus, the act can be

[38] *Wilkinson v. Leland*, 27 U.S. 627, 657-58 (1829) ("We know of no case, in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the union. On the contrary, it has been constantly resisted as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced.").

> saved by the payment of just compensation but cannot be constitutionally applied without it.

App. 41 (emphasis added).

While it is obvious that the Florida Supreme Court did not intend to create a taking, it is equally obvious that the majority intended to "redefine" the law in an attempt to avoid a taking. Regardless of the intent, the effect of the Florida Supreme Court's decision is the same: an uncompensated taking. As Justice Stewart noted, no matter what a court "says" in its opinion about what the court is doing or how it attempts to justify the result, a taking is measured by what the opinion **does**.[39] The Florida Supreme Court's opinion effects a "sudden change in state law, unpredictable in terms of the relevant precedents" in violation of the Due Process Clause of the Fourteenth Amendment.

It is further apparent from the Florida Supreme Court's opinion that it is greatly concerned with ensuring the State's beach restoration program remains intact. While such a goal is noble, the Florida Supreme Court's duty is to strictly interpret the law and uphold constitutional rights against infringements. In the unfortunate event that a worthwhile regulatory program infringes on such constitutional rights, it is the Legislature's duty to solve the problem, not a state court's duty to "redefine" constitutional rights.

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[39] *Hughes v. Washington*, 389 U.S. 290, 297-98 (1967).

The United States Constitution forbids the State's action in this case. Accordingly, this Court should grant certiorari and reverse the Florida Supreme Court's decision.

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No. _____

In The Supreme Court of the United States

STOP THE BEACH RENOURISHMENT, INC.,

Petitioner,

v.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND, WALTON COUNTY, and CITY OF DESTIN,

Respondents.

On Petition for Writ of Certiorari to the Florida Supreme Court

APPENDIX

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SUPREME COURT OF FLORIDA

CASE No. SC06-1447

WALTON COUNTY, et al.,
Petitioners,

vs.

STOP THE BEACH RENOURISHMENT, INC., et al.,
Respondents.

No. SC06-1449

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, etc.,
Petitioner,
vs.

STOP THE BEACH RENOURISHMENT, INC., et al.,
Respondents.

[September 29, 2008]

BELL, J.

We have for review the First District Court of Appeal's decision in Save Our Beaches, Inc. v.

Florida Department of Environmental Protection, 31 Fla. L. Weekly D1173 (Fla. 1st DCA Apr. 28, 2006). In its decision, the First District certified the following question to be of great public importance:

> Has Part I of Chapter 161, Florida Statutes (2005), referred to as the Beach and Shore Preservation Act, been unconstitutionally applied so as to deprive the members of Stop the Beach Renourishment, Inc. of their riparian rights without just compensation for the property taken, so that the exception provided in Florida Administrative Code Rule 18-21.004(3), exempting satisfactory evidence of sufficient upland interest if the activities do not unreasonably infringe on riparian rights, does not apply?

Id. We have both mandatory and discretionary jurisdiction. See art. V, § 3(b)(1), § 3(b)(4), Fla. Const.

Though it phrased its certified question in terms of an applied challenge, the First District actually addressed a facial challenge.[1] Therefore, we rephrase the certified question as follows:

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[1] We must note that the First District should have refrained from considering what is essentially a facial challenge since Stop the Beach Renourishment (STBR) acknowledged that it was a party in circuit court to a facial challenge of the same act. See Key Haven Assoc. Enters. v. Bd. of Trs. of the Internal Improvement Trust Fund, 427 So. 2d 153, 157 (Fla.

> On its face, does the Beach and Shore Preservation Act[2] unconstitutionally deprive upland owners of littoral[3] rights without just compensation?

We answer the rephrased certified question in the negative and quash the decision of the First District. As explained below, we find that, on its

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1982) (explaining that if a party chooses to pursue a facial challenge in circuit court, the party is foreclosed from proceeding with a facial challenge before the district court in its appeal of final agency action).

[2] For ease of reading, we refer generally to the statutory provisions at issue as "the Beach and Shore Preservation Act" or the "Act." However, this case only concerns the following provisions of part I of chapter 161, Florida Statutes (2005): sections 161.088, 161.101, 161.141, 161.161, 161.191, 161.201, and 161.211.

[3] As noted by the First District, cases and statutes "have used 'riparian owner' broadly to describe all waterfront owners." Save Our Beaches, 31 Fla. L. Weekly at D1176 (quoting Bd. of Trs. of the Int. Imp. Trust Fund v. Sand Key Assocs., Ltd., 512 So. 2d 934, 936 (Fla. 1987)). Indeed, the use of the term riparian in the Beach and Shore Preservation Act encompasses all waterfront owners' rights. However, "[t]he term 'riparian owner' applies to waterfront owners along a river or stream, and the term 'littoral owner' applies to waterfront owners abutting an ocean, sea, or lake." Sand Key, 512 So. 2d at 936; see also John M. Gould, A Treatise on the Law of Waters § 148 at 297, n.1 (1900) ("Littoral is derived from Latin litus, the sea-shore."). Because this case involves beachfront owners, we use the term "littoral" to describe the rights at issue.

face, the Beach and Shore Preservation Act does not unconstitutionally deprive upland owners of littoral rights without just compensation. At the outset, however, we emphasize that our decision in this case is strictly limited to the context of restoring critically eroded beaches under the Beach and Shore Preservation Act.

I. THE CONTEXT

A. Factual and Procedural History

As the First District explained in its opinion,

> [t]he Gulf of Mexico beaches of the City of Destin and Walton County were [damaged] by Hurricane Opal in 1995.[4] The . . . problem was identified by the Department [of Environmental Protection (Department)], which placed these beaches on its list of critically-eroded beaches. Destin and Walton County then initiated a lengthy process of beach restoration through renourishment. The process, which included extensive studies and construction design and pre-application conferences with Department staff, culminated in the filing of an Application for a Joint Coastal Permit

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[4] This shoreline was subsequently damaged by Hurricane Georges (1998), Tropical Storm Isidore (2002), and Hurricane Ivan (2004).

> and Authorization to Use Sovereign Submerged Lands on July 30, 2003.
>
> The application proposed to dredge sand from an ebb shoal borrow area south of East Pass in eastern Okaloosa County, using either a cutter head dredge (which disturbs the sand on the bottom of the borrow area and vacuums it into a pipeline which delivers it to the project area) or a hopper dredge (which fills itself and is moved to the project site). On the project site, heavy equipment moves the dredged sand as specified in the design plans. The project is executed in this manner and progresses along the beach, usually at a pace of about 300 to 500 feet a day.

Save Our Beaches, 31 Fla. L. Weekly at D1173.

To determine the mean high water line (MHWL) for the restoration area, a coastline survey was completed in September 2003. The Board of Directors for the Internal Improvement Trust Fund (Board) subsequently established an erosion control line (ECL) at the surveyed MHWL. Pursuant to section 161.191(1) of the Beach and Shore Preservation Act, this ECL became the boundary between publicly owned land and privately owned upland after it was recorded. Then, on July 15, 2004, the Department issued a Notice of Intent to Issue the permit.

Stop the Beach Renourishment (STBR)[5] timely filed two petitions for formal administrative hearings, the first challenging the issuance of the permit and the second raising constitutional issues. A formal administrative hearing was held on STBR's permit challenge while its constitutional challenge was deferred for determination in court proceedings. See Save Our Beaches, 31 Fla. L Weekly at D1174-75.[6]

On June 30, 2005, following the administrative hearing, the administrative law judge recommended that the Department enter a final order issuing the permit. The Department entered its final order on July 27, 2005, determining

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[5] STBR is a not-for-profit association that consists of six owners of beachfront property in the area of the proposed project. At the administrative and district level, Save Our Beaches, Inc. was a co-party. The administrative law judge and the First District determined that Save Our Beaches lacked standing to maintain its claims as its approximately 150 members were not necessarily owners of beachfront property in the affected area. Save Our Beaches, 31 Fla. L. Weekly at D1175. Save Our Beaches is no longer a party to the litigation.

[6] At the administrative hearing, the only remaining issues were: (1) whether there was standing; (2) whether Destin and Walton County gave reasonable assurance that applicable water quality standards will not be violated; and (3) whether Destin and Walton County have obtained, or are able to obtain, all requisite private property rights necessary to implement the proposed project. In its appeal, STBR did not seek reversal based on these issues. See Save Our Beaches, 31 Fla. L. Weekly at D1175.

that the permit was properly issued pursuant to existing statutes and rules.

Before the First District, STBR challenged the Department's final order, claiming in essence that the final order is unconstitutional because it was issued pursuant to an unconstitutional statute. Specifically, STBR asserted that section 161.191(1) of the Beach and Shore Preservation Act, which fixes the shoreline boundary after the ECL is recorded, unconstitutionally divests upland owners of all common law littoral rights by severing these rights from the uplands. According to STBR, after the recording of the ECL and by operation of section 161.191(1), the State becomes owner of the land to which common law littoral rights attach because it owns all lands seaward of the ECL. STBR further argued that the littoral rights, which are expressly preserved by section 161.201 of the Act, are an inadequate substitute for the upland owners' common law littoral rights that are eliminated by section 161.191.

The First District agreed the Act divests upland owners of their littoral right to receive accretions and relictions because section 161.191(2) provides that the common law rule of accretion and reliction no longer operates once the ECL is recorded. See Save Out Beaches, 31 Fla. L. Weekly at D1177. The First District also agreed that the Act eliminates the right to maintain direct contact with the water since section 161.191(1) establishes the ECL as the shoreline boundary. See id. Furthermore, the First District found that:

> Although section 161.201 has language describing a preservation of common law riparian rights, it does not actually operate to preserve the rights at issue . . . [because] Florida's law is clear that riparian rights cannot be severed from riparian uplands absent an agreement with the riparian owner, not even by the power of eminent domain.

Id. (citing Belvedere Dev. Corp. v. Dep't of Transp., 476 So. 2d 649 (Fla. 1985) as controlling). Thus, the First District held that the final order issued pursuant to the Act results in an unconstitutional taking of the littoral rights to accretion and to contact with water without an eminent domain proceeding as required by section 161.141, Florida Statutes. Id.

The First District remanded for the Department to provide satisfactory evidence of sufficient upland interest pursuant to Florida Administrative Code Rule 18-21.004(3). Id. Then, on July 3, 2006, the First District certified the question of great public importance described earlier. Id.

B. The Beach and Shore Preservation Act

Before addressing the rephrased certified question, it is helpful to provide the relevant portions of the Beach and Shore Preservation Act.

Recognizing the importance and volatility of Florida's beaches, the Legislature in 1961 enacted the Beach and Shore Preservation Act. Ch. 61-246, § 1, Laws of Fla. (codified at §§ 161.011-161.45, Fla.

Stat. (2005)). Determining that "beach erosion is a serious menace to the economy and general welfare of the people of [Florida] and has advanced to emergency proportions," the Legislature declared it "a necessary governmental responsibility to properly manage and protect Florida beaches . . . from erosion," and to provide funding for beach nourishment projects. § 161.088. The Legislature then delegated to the Department the authority to determine "those beaches which are critically eroded and in need of restoration and nourishment"[7] and to "authorize appropriations to pay up to 75 percent of the actual costs for restoring and renourishing a critically eroded beach." § 161.101(1).

Pursuant to section 161.141, when a local government applies for funding for beach

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[7] The Florida Administrative Code defines "critically eroded shoreline" as

> a segment of shoreline where natural processes or human activities have caused, or contributed to, erosion and recession of the beach and dune system to such a degree that upland development, recreational interests, wildlife habitat or important cultural resources are threatened or lost. Critically eroded shoreline may also include adjacent segments or gaps between identified critical erosion areas which, although they may be stable or slightly erosional now, their inclusion is necessary for continuity of management of the coastal system or for the design integrity of adjacent beach management projects.

Fla. Admin. Code R. 62B-36.002(4).

restoration, a survey of the shoreline is conducted to determine the MHWL for the area. Once established, any additions to the upland property landward of the MHWL that result from the restoration project remain the property of the upland owner subject to all governmental regulations, including a public easement for traditional uses of the beach. § 161.141.

After the MHWL is established, section 161.161(3) provides that the Board must determine the area to be protected by the project and locate an ECL. In locating the ECL, the Board is "guided by the existing line of mean high water, bearing in mind the requirements of proper engineering in the beach restoration project, the extent to which erosion or avulsion has occurred, and the need to protect existing ownership of as much upland as is reasonably possible." § 161.161(5).

Pursuant to section 161.191(1), this ECL becomes the new fixed property boundary between public lands and upland property after the ECL is recorded.[8] And, under section 161.191(2), once the

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[8] It is important to note that the question of a fixed boundary at the ECL only applies to the beaches "of the Atlantic Ocean, the Gulf of Mexico, and the bays, lagoons and other tidal reaches thereof." Specifically, section 161.151, Florida Statutes (2005), defines an ECL, or "erosion control line," as the line determined in accordance with the provisions of ss. 161.141-161.211 which represents the landward extent of the claims of the state in its capacity as sovereign titleholder of the submerged bottoms and shores of the Atlantic Ocean, the Gulf of Mexico, and the bays, lagoons and other tidal reaches thereof on the date of the recording of the survey as authorized in s. 161.181.

ECL has been established, the common law no longer operates "to increase or decrease the proportions of any upland property lying landward of such line, either by accretion or erosion or by any other natural or artificial process."

However, section 161.201 expressly preserves the upland owners' littoral rights, including, but not limited to, rights of ingress, egress, view, boating, bathing, and fishing, and prevents the State from erecting structures on the beach seaward of the ECL except as required to prevent erosion. Section 161.141 further declares that the State has no intention "to extend its claims to lands not already held by it or to deprive any upland or submerged land owner of the legitimate and constitutional use and enjoyment of his or her property."

Moreover, section 161.141 explains that "[i]f an authorized beach restoration, beach nourishment, and erosion control project cannot reasonably be accomplished without the taking of private property, the taking must be made by the requesting authority by eminent domain proceedings." And, in the event the beach restoration is not commenced within a two-year period, is halted in excess of a six-month period, or the authorities do not maintain the restored beach, section 161.211 dictates that the ECL is cancelled.

II. DISCUSSION

As stated earlier, the First District determined that section 161.191 of the Beach and Shore Preservation Act facially results in an unconstitutional taking of upland owners' littoral

rights to receive accretions and to maintain direct contact with the water despite the express preservation of littoral rights in section 161.201. The determination of a statute's constitutionality and the interpretation of a constitutional provision are both questions of law reviewed de novo by this Court. See Zingale v. Powell, 885 So. 2d 277, 280 (Fla. 2004). "While we review decisions striking state statutes de novo, we are obligated to accord legislative acts a presumption of constitutionality and to construe challenged legislation to effect a constitutional outcome whenever possible." Fla. Dep't of Revenue v. Howard, 916 So. 2d 640, 642 (Fla. 2005). Moreover, "a determination that a statute is facially unconstitutional means that no set of circumstances exists under which the statute would be valid." Fla. Dep't of Revenue v. City of Gainesville, 918 So. 2d 250, 256 (Fla. 2005).

After reviewing Florida's common law as well as the Beach and Shore Preservation Act's effect upon that common law, we find that the Act, on its face, does not unconstitutionally deprive upland owners of littoral rights without just compensation. In explaining our conclusion, we first describe the relationship at common law between the public and upland owners in regard to Florida's beaches. We then detail the Beach and Shore Preservation Act's impact upon this relationship. In particular, we explore how the Act effectuates the State's constitutional duty to protect Florida's beaches in a way that facially balances public and private interests. Finally, we address the First District's decision.

A. The Relationship at Common Law between the Public and Upland Owners

Since the vast development of Florida's beaches, there has been a relative paucity of opinions from this Court that describe the nature of the relationship at common law between the public and upland owners in regard to Florida's beaches. It is important that we outline this relationship prior to resolving the specific issues in this case.

(1) The Public and Florida's Beaches

Under both the Florida Constitution and the common law, the State holds the lands seaward of the MHWL, including the beaches between the mean high and low water lines, in trust for the public for the purposes of bathing, fishing, and navigation. See art. X, § 11, Fla. Const. ("The title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people."); White v. Hughes, 190 So. 446, 449 (Fla. 1939) ("The State holds the fore-shore in trust for its people for the purposes of navigation, fishing and bathing."); see also Clement v. Watson, 58 So. 25, 26 (Fla. 1912).

As we explained in Brickell v. Trammel, 82 So. 221 (Fla. 1919), this public trust doctrine has its origins in English common law:

> Under the common law of England the crown in its sovereign capacity held the title to the beds of

navigable or tide waters, including the shore or the space between high and low water marks, in trust for the people of the realm who had rights of navigation, commerce, fishing, bathing, and other easements allowed by law in the waters. This rule of the common law was applicable in the English colonies of America.

After the Revolution resulting in the independence of the American states, title to the beds of all waters, navigable in fact, whether tide or fresh, was held by the states in which they were located, in trust for all the people of the states respectively.

When the Constitution of the United States became operative, the several states continued to hold the title to the beds of all waters within their respective borders that were navigable in fact without reference to the tides of the sea, not for purposes of disposition to individual ownerships, but such title was held in trust for all the people of the state respectively, for the uses afforded by the waters as allowed by the express or implied provisions of law, subject to the rights surrendered by the states under the federal Constitution.

The rights of the people of the states in the navigable waters and the lands thereunder, including the shore or space between ordinary high and low waters marks, relate to navigation,

commerce, fishing, bathing, and other easements allowed by law. These rights are designed to promote the general welfare and are subject to lawful regulation by the states, and such regulation is subordinate to the powers of Congress as to interstate commerce, navigation, post roads, etc., and to the constitutional guaranties of private property rights.

The trust in which the title to the lands under navigable waters is held is governmental in its nature and cannot be wholly alienated by the states. For the purpose of enhancing the rights and interests of the whole people, the states may by appropriate means grant to individuals limited privileges in the lands under navigable waters, but not so as to divert them or the waters thereon from their proper uses for the public welfare, or so as to relieve the states respectively of the control and regulation of the uses afforded by the land and the waters, or so as to interfere with the lawful authority of Congress. See 57 So. 428; Clement v. Watson, 58 So. 25.

New states, including Florida, admitted "into the Union on equal footing with the original states, in all respects whatsoever," have the same rights, prerogatives, and duties with respect to the navigable waters and the lands thereunder within their borders

> as have the original 13 states of the American Union. Among these prerogatives are the right and duty of the states to own and hold the lands under navigable waters for the benefit of the people . . . .

Id. at 226 (parallel citations omitted); see also Hayes v. Bowman, 91 So. 2d 795, 799 (Fla. 1957); State v. Gerbing, 47 So. 353, 355-56 (Fla. 1908).

In addition to its duties under the public trust doctrine, the State has an obligation to conserve and protect Florida's beaches as important natural resources. As article II, section 7(a) of the Florida Constitution states,

> [i]t shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise and for the conservation and protection of natural resources.

Concisely put, the State has a constitutional duty to protect Florida's beaches, part of which it holds "in trust for all the people." Art. X, § 11, Fla. Const.

Having explained the State's interests and duties on behalf of the public in relation to Florida's beaches, we now describe the upland owners' interests and rights.

(2) The Upland Owners and Florida's Beaches

Private upland owners hold the bathing, fishing, and navigation rights described above in common with the public. Brickell, 82 So. at 227; Broward v. Mabry, 50 So. 826, 830 (Fla. 1909). In fact, upland owners have no rights in navigable waters and sovereignty lands that are superior to other members of the public in regard to bathing, fishing, and navigation. See Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n, 48 So. 643, 645 (Fla. 1909). However, upland owners hold several special or exclusive common law littoral rights: (1) the right to have access to the water; (2) the right to reasonably use the water; (3) the right to accretion and reliction; and (4) the right to the unobstructed view of the water. Bd. of Trs. of the Internal Improvement Trust Fund v. Sand Key Assocs., Ltd., 512 So. 2d 934, 936 (Fla. 1987); Belvedere, 476 So. 2d at 651; Brickell, 82 So. at 227; Broward, 50 So. at 830. These special littoral rights "are such as are necessary for the use and enjoyment" of the upland property, but "these rights may not be so exercised as to injure others in their lawful rights." Ferry Pass, 48 So. at 645.

Though subject to regulation, these littoral rights are private property rights that cannot be taken from upland owners without just compensation. Sand Key, 512 So. 2d at 936; Brickell, 82 So. at 227; Broward, 50 So. at 830. Indeed, in Thiesen v. Gulf, Florida & Alabama Railway Co., 78 So. 491, 506-07 (Fla. 1918), this Court considered and rejected the notion that littoral rights are subordinate to public rights and, as a result, could be eliminated without compensation. And, over the years, Florida courts have found unconstitutional

takings when certain littoral rights were materially and substantially impaired. See Lee County v. Kiesel, 705 So. 2d 1013 (Fla. 2d DCA 1998) (holding that upland owners were entitled to compensation because bridge substantially and materially obstructed their littoral right to view); Game & Fresh Water Fish Comm'n v. Lake Islands, Ltd., 407 So. 2d 189 (Fla. 1981) (holding that boating regulation was unconstitutional as to littoral owner because it substantially denied the right of access); see also Webb v. Giddens, 82 So. 2d 743 (Fla. 1955) (finding that culvert substantially impaired littoral owner's right of access); cf. Duval Eng'g & Contracting Co. v. Sales, 77 So. 2d 431 (Fla. 1954) (holding that upland owners had no right to compensation when there was only a slight impairment of littoral rights and owners did not show a material disturbance of the littoral rights to access and view).

While Florida case law has clearly defined littoral rights as constitutionally protected private property rights, the exact nature of these rights rarely has been described in detail. See Webb, 82 So. 2d at 745 (explaining that littoral rights "have been broadly and inexactly stated").[9] Early on, this Court described the nature of littoral rights as follows:

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[9] The nature of upland owners' littoral rights is considered a matter of state law. See Arkansas v. Tennessee, 246 U.S. 158, 176 (1918); Barney v. City of Keokuk, 94 U.S. 324, 337 (1876); Webb v. Giddens, 82 So. 2d 743, 744 (Fla. 1955). As a result, the law regarding littoral rights varies among the states. For example, in contrast to Florida, littoral rights in Mississippi "are not property rights per se; instead they are mere licenses or privileges" that can be revoked. Miss. State

> These special rights are easements incident to the [littoral] holdings and are property rights that may be regulated by law, but may not be taken without just compensation and due process of law. The common-law [littoral] rights that arise by implication of law give no title to the land under navigable waters except such as may be lawfully acquired by accretion, reliction, and other similar rights.

Brickell, 82 So. at 227 (emphasis added); see also Broward, 50 So. at 830.

Based upon this early description, the littoral rights to access, use, and view are easements under Florida common law.[10] Generally speaking, "[a]n easement creates a nonpossessory right to enter and

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Highway Comm'n v. Gilich, 609 So. 2d 367, 375 (Miss. 1992). And, North Carolina courts have held that littoral rights are subordinate to public trust rights, meaning legislative authority to protect public trust rights in North Carolina is limited by an upland owner's right to retain some use or value in the upland property. See Weeks v. N.C. Dep't of Natural Res., 388 S.E. 2d 228, 234 (N.C. Ct. App. 1990).

[10] We recognize that the littoral rights to access, use, and view are different from so-called "true easements" in that littoral rights are incidental to littoral ownership and do not require a separate act of creation. *See* Jon W. Bruce, The Law of Easements and Licenses in Land § 1.02 (1995). However, once acquired, the nature of the two different categories of easements is generally the same. See Harry A. Bigelow, Natural Easements, 9 Ill. L. Rev. 541, 542 (1915).

use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement." Restatement (Third) of Property § 1.2(1) (2000). More specifically, the littoral rights to access and use are affirmative easements as they grant "rights to enter and use land in possession of another." Id. at § 1.2 cmt. a. In contrast, the littoral right to view is a negative easement as it "restrict[s] the uses that can be made of property." Id.

Furthermore, based upon this Court's early description of the nature of littoral rights, it is evident that the littoral right to accretion and reliction is distinct from the rights to access, use, and view. The rights to access, use, and view are rights relating to the present use of the foreshore and water. The same is not true of the right to accretion and reliction. The right to accretion and reliction is a contingent, future interest that only becomes a possessory interest if and when land is added to the upland by accretion or reliction. See Brickell, 82 So. at 227 ("[Littoral] rights . . . give no title to the land under navigable waters except such as may be lawfully acquired by accretion, reliction, and other similar rights."); cf. Restatement of Property § 153 (1936) (defining the nature of future interests).

At this point, we have described the upland owners' littoral rights and the State's duties in regard to Florida's beaches. We next explain how the common law attempts to bring order and certainty to the physical location where these often competing interests intersect.

(3) Dealing with a Dynamic Boundary

The boundary between public or sovereignty lands and private uplands is a dynamic boundary, which is located on a shoreline that, by its very nature, frequently changes. Florida's common law attempts to bring order and certainty to this dynamic boundary in a manner that reasonably balances the affected parties' interests.

Before detailing the common law rules that are intended to balance public and private interests in the changing shoreline, it is helpful to review several common law definitions. "Erosion" is the gradual and imperceptible wearing away of land from the shore or bank. See generally Black's Law Dictionary (8th ed. 2004). And, as we have explained,

> "[a]ccretion" means the gradual and imperceptible accumulation of land along the shore or bank of a body of water. "Reliction" or "dereliction" is an increase of the land by a gradual and imperceptible withdrawal of any body of water. "Avulsion" is the sudden or perceptible loss of or addition to land by the action of the water or a sudden change in the bed of a lake or the course of a stream. "Gradual and imperceptible" means that, although witnesses may periodically perceive changes in the waterfront, they could not observe them occurring. See generally Black's Law Dictionary (5th ed. 1979); F. Maloney, S. Plager & F.

> Baldwin, Water Law and Administration -- The Florida Experience 385-92 (1968); 65 C.J.S. Navigable Waters §§ 81, 86, 93 (1966).

Sand Key, 512 So. 2d at 936. Moreover, "alluvion" describes the actual deposit of land that is added to the shore or bank. See Mark S. Dennison, Proof of Accretion or Avulsion in Title Boundary Disputes Over Additions to Riparian Land, 73 Am. Jur. Proof of Facts 3d 167, § 2, at 180 (2003).

The boundary between public lands and private uplands is the MHWL, which represents an average over a nineteen-year period. Kruse v. Grokap, Inc., 349 So. 2d 788, 789-90 (Fla. 2d DCA 1977) (citing Borax Consolidated, Ltd. v. City of Los Angeles, 296 U.S. 10 (1935); Miller v. Bay-To-Gulf, Inc., 193 So. 425 (Fla. 1940)); see also George M. Cole, Tidal Water Boundaries, 20 Stetson L. Rev. 165 (1990). As the Second District has explained, "[t]he variations which occur in major tide producing forces will go through one complete cycle in approximately 18.6 years. Apparently this figure is often rounded out to nineteen years." Kruse, 349 So. 2d at 789-90 (citing Frank E. Maloney & Richard C. Ausness, The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping, 53 N.C. L. Rev. 185, 196 (1974)). This nineteen-year period for determining the MHWL is codified in section 177.27, Florida Statutes (2007), a provision of the Florida Coastal Mapping Act of 1974. See id. at 790 n.8 (citing § 177.27(15), Fla. Stat. (1975)).

Under Florida common law, the legal effect of changes to the shoreline on the boundary between public lands and uplands varies depending upon whether the shoreline changes gradually and imperceptibly or whether it changes suddenly and perceptibly. Blackstone summarized this ancient distinction as follows:

> And as to lands gained from the sea, either by alluvion, by the washing up of sand and earth, so as in time to make terra firma; or by dereliction, as when the sea shrinks back below the usual watermark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For de minimis non curat lex: and, besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible charge or loss. But, if the alluvion or dereliction be sudden and considerable, in this case it belongs to the king: for, as the king is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil, when the water has left it dry.

William Blackstone, 2 Commentaries on the Laws of England, 261-62 (footnotes omitted). Or, as stated in more current language,

> [t]he principal significance of the distinction between erosion[, reliction,] and accretion on the one hand, and avulsion on the other, is that the owner of the [upland] loses title to land that is lost by erosion and ordinarily becomes the owner of land that is added to his land by accretion [or reliction], whereas if an avulsion has occurred, the boundary line remains the same regardless of the change in the . . . shoreline.

73 Am. Jur. Proof of Facts 3d 167, § 3, at 182; see also 1 Water and Water Rights § 6.03(b)(2), at 189 (Robert E. Beck ed., 1991); 78 Am. Jur. 2d Waters § 315 (2002).

Accordingly, under the doctrines of erosion, reliction, and accretion, the boundary between public and private land is altered to reflect gradual and imperceptible losses or additions to the shoreline. See, e.g., Sand Key, 512 So. 2d 934. In contrast, under the doctrine of avulsion, the boundary between public and private land remains the MHWL as it existed before the avulsive event led to sudden and perceptible losses or additions to the shoreline. See, e.g., Bryant v. Peppe, 238 So. 2d 836, 838 (Fla. 1970).

These common law doctrines reflect an attempt to balance the interests of the parties affected by inevitable changes in the shoreline. For instance, as the Second District explained in Board of Trustees of the Internal Improvement Trust Fund v. Medeira Beach Nominee, Inc., 272 So. 2d 209, 212-

13 (Fla. 2d DCA 1973), "[t]here are four reasons for the doctrine of accretion:"

> (1) [D]e minimis non curat lex; (2) he who sustains the burden of losses and of repairs imposed by the contiguity of waters ought to receive whatever benefits they may bring by accretion; (3) it is in the interest of the community that all land have an owner and, for convenience, the riparian is the chosen one; (4) the necessity for preserving the riparian right of access to the water. See St. Clair County v. Lovingston, 90 U.S. (23 Wall.) 46, 67 (1874); Maloney, Plager and Baldwin, Water Law and Administration: The Florida Experience, 386 (1968).

Id. 212-13 (parallel citations omitted). These same reasons explain the doctrine of reliction. And, as for the rationale underlying the doctrine of avulsion, it has been argued that there is a need to mitigate the hardship of drastic shifts in title that would result if the doctrines of accretion, erosion, and reliction were applied to sudden and unexpected changes in the shoreline. See Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 327 (1973), overruled on other grounds by Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977); Nebraska v. Iowa, 143 U.S. 359, 362 (1892); see also Strom v. Sheldon, 527 P.2d 1382, 1384 (Wash. Ct. App. 1975).

While our common law has developed these specific rules that are intended to balance the interests in our ever-changing shoreline, Florida's

common law has never fully addressed how public-sponsored beach restoration affects the interests of the public and the interests of the upland owners. We now turn to the legislative attempt to deal with this subject.

B. The Beach and Shore Preservation Act's Balancing of Public and Private Interests

As explained earlier, the State has a constitutional duty to protect Florida's beaches, part of which it holds in trust for public use. The Beach and Shore Preservation Act effectuates this constitutional duty when the State is faced with critically eroded, storm-damaged beaches.

Like the common law, the Act seeks a careful balance between the interests of the public and the interests of the private upland owners. By authorizing the addition of sand to sovereignty lands, the Act prevents further loss of public beaches, protects existing structures, and repairs prior damage. In doing so, the Act promotes the public's economic, ecological, recreational, and aesthetic interests in the shoreline. On the other hand, the Act benefits private upland owners by restoring beach already lost and by protecting their property from future storm damage and erosion. Moreover, the Act expressly preserves the upland owners' rights to access, use, and view, including the rights of ingress and egress. See § 161.201. The Act also protects the upland owners' rights to boating, bathing, and fishing. See id. Furthermore, the Act protects the upland owners' view by prohibiting the State from erecting structures on the new beach except those necessary to prevent erosion. See id.

Thus, although the Act provides that the State may retain title to the newly created dry land directly adjacent to the water, upland owners may continue to access, use, and view the beach and water as they did prior to beach restoration. As a result, at least facially, there is no material or substantial impairment of these littoral rights under the Act. See Duval, 77 So. 2d at 434 (finding no taking when there was no material or substantial impairment of littoral rights to access and view).

Finally, the Act provides for the cancellation of the ECL if (1) the beach restoration is not commenced within two years; (2) restoration is halted in excess of a six-month period; or (3) the authorities do not maintain the restored beach. See § 161.211. Therefore, in the event the beach restoration is not completed and maintained, the rights of the respective parties revert to the status quo ante.

To summarize, the Act effectuates the State's constitutional duty to protect Florida's beaches in a way that reasonably balances public and private interests. Without the beach renourishment provided for under the Act, the public would lose vital economic and natural resources. As for the upland owners, the beach renourishment protects their property from future storm damage and erosion while preserving their littoral rights to access, use, and view. Consequently, just as with the common law, the Act facially achieves a reasonable balance of interests and rights to uniquely valuable and volatile property interests.

Having explained how the Act effectuates the State's constitutional duty to protect Florida's beaches in a way that, at least facially, balances the interests and rights involved, we turn directly to the First District's decision.

C. The First District's Decision

As stated earlier, the First District determined that the Beach and Shore Preservation Act results in an unconstitutional taking of upland owners' rights to accretions and to contact with the water. In its opinion, the First District essentially employed the following three-step analysis: (1) it found sections 161.191 and 161.201, which fix the shoreline boundary and suspend the operation of the common law rule of accretion but preserve the littoral rights of access, view, and use after an ECL is recorded, facially unconstitutional; (2) then, because eminent domain proceedings did not occur as required by section 161.141, it found that the Act was unconstitutionally applied by the Department in this case; and (3) because littoral rights were unconstitutionally taken, it found that property rights had been unreasonably infringed, making it necessary for the Department to provide satisfactory evidence of sufficient upland interest pursuant to rule 18-21.004(3). Save Our Beaches, 31 Fla. L. Weekly at D1177. We disagree.

We find facially constitutional the provisions of the Act that fix the shoreline boundary and that suspend the operation of the common law rule of accretion but preserve the littoral rights of access,

view, and use after an ECL is recorded.[11] Therefore, we hold that the Act, on its face, does not unconstitutionally deprive upland owners of littoral rights without just compensation.

In explaining our disagreement with the First District, we first discuss how the First District failed to consider the doctrine of avulsion. The doctrine of avulsion is pivotal because, under that doctrine, the public has the right to reclaim its land lost by an avulsive event. We then address why, in the context of this Act, the littoral right to accretion is not an issue. Thereafter, we explain that there is no independent littoral right of contact with the water under Florida common law. Finally, we discuss why our decision in Belvedere is not applicable to the inquiry involved in this case.

(1) Doctrine of Avulsion

In its opinion, the First District stated that beach restoration under the Act "will cause the high water mark to move seaward and ordinarily this would result in the upland landowners gaining property by accretion." Save Our Beaches, 31 Fla. L. Weekly at D1177. This statement fails to consider the doctrine of avulsion, most likely because the parties did not raise the issue before the First District. As a result, the First District never

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[11] Because we conclude that the Act is facially constitutional, we need not address the other portions of the First District's analysis.

considered whether the Act is facially constitutional given the doctrine of avulsion.[12]

Under Florida common law, hurricanes, such as Hurricane Opal in 1995, are generally considered avulsive events that cause avulsion. See Peppe, 238 So. 2d at 838; see also Ford v. Turner, 142 So. 2d 335, 339 (Fla. 2d DCA 1962); Siesta Properties, Inc. v. Hart, 122 So. 2d 218, 222-23 (Fla. 2d DCA 1960). As explained previously, avulsion is "the sudden or perceptible loss of or addition to the land by the action of the water or a sudden change in the bed of a lake or the course of a stream." Sand Key, 512 So. 2d at 936; see also Peppe, 238 So. 2d at 837; Siesta Props., 122 So. 2d at 223.

Contrary to the First District's statement about accretion, under the doctrine of avulsion, the boundary between public lands and privately owned uplands remains the MHWL as it existed before the avulsive event.[13] In Peppe, this Court expressly applied the doctrine of avulsion and held that title to

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[12] As stated earlier, "a determination that a statute is facially unconstitutional means that no set of circumstances exists under which the statute would be valid." Fla. Dep't of Revenue v. City of Gainesville, 918 So. 2d at 256.

[13] As Joseph J. Kalo explains, "at common law, an avulsive change could result in the loss of that valuable feature of oceanfront property ownership -- direct contact with and access to the ocean." North Carolina Oceanfront Property and Public Waters and Beaches: The Rights of Littoral Owners in the Twenty-First Century, 83 N.C. L. Rev. 1427, 1438 (2004).

a narrow strip of land that was submerged until a 1926 hurricane brought it to the surface remained in the State, not the adjoining landowners. 238 So. 2d at 838. This Court first determined that the hurricane was an avulsive event. Id. Then, we reasoned that the parcel in question "was originally sovereignty land; and it did not lose that character merely because, by avulsion, it became dry land." Id. Therefore, we found that "the plaintiff-respondents were charged with notice that the sudden avulsion of the parcel in controversy gave them no more title to it than they had to the water bottom before its emergence as dry land." Id. at 839.

Significantly, when an avulsive event leads to the loss of land, the doctrine of avulsion recognizes the affected property owner's right to reclaim the lost land within a reasonable time. See generally 1 Henry Philip Farnham, The Law of Waters and Water Rights § 74, at 331 (1904) ("If a portion of the land of the riparian [or littoral] owner is suddenly engulfed, and the former boundary can be determined or the land reclaimed within a reasonable time, he does not lose his title to it."). In State v. Florida National Properties, Inc., 338 So. 2d 13 (Fla. 1976), this Court specifically explained that affected property owners can return their property to its pre-hurricane status.[14][14] In Florida National

[14] This right to reclaim is consistent with other jurisdictions' determinations that, under the common law, littoral/riparian owners (including government entities) do not lose title and rights to land lost after an avulsive event if it is subsequently reclaimed by the littoral/riparian owners. See, e.g., City of Chicago v. Ward, 48 N.E. 927 (Ill. 1897); Fowler v. Wood, 85 P. 763 (Kan. 1906); City of New York v. Realty Assocs., 176 N.E. 171 (N.Y. 1931).

Properties, littoral "owners had exercised self-help by dynamiting obstacles from a drainage canal to return [Lake Istokpoga] to an ordinary level . . . following the historic 1926 hurricane." Id. at 16. This Court stated that the "self-help by the [littoral] owners did not affect [sic] a lowering of the water level below the normal high-water mark; instead, as the survey notes show, the action merely returned the water to its normal level and did not expose any lake bottom." Id. at 18. In that circumstance, the Court determined that the littoral owners retained title to the present MHWL, which represented the pre-hurricane MHWL, and to the land they had reclaimed through lawful drainage of the lake. Id.

To summarize, when the shoreline is impacted by an avulsive event, the boundary between public lands and private uplands remains the pre-avulsive event MHWL. Consequently, if the shoreline is lost due to an avulsive event, the public has the right to restore its shoreline up to that MHWL. In light of this common law doctrine of avulsion, the provisions of the Beach and Shore Preservation Act at issue are facially constitutional. In the context of restoring storm-ravaged public lands, the State would not be doing anything under the Act that it would not be entitled to accomplish under Florida's common law. Like the common law doctrine of avulsion, the Act authorizes the State to reclaim its storm-damaged shoreline by adding sand to submerged sovereignty lands. See generally §§ 161.088, 161.091, 161.101. And similar to the common law, the Act authorizes setting the ECL and the boundary between sovereignty lands and private uplands at "the existing line of mean high water, bearing in mind . . .

the extent to which . . . avulsion has occurred." See § 161.161(5). In other words, when restoring storm-ravaged shoreline, the boundary under the Act should remain the pre-avulsive event boundary.[15] Thus, because the Act authorizes actions to reclaim public beaches that are also authorized under the common law after an avulsive event, the Act is facially constitutional.

(2) Common Law Right to Accretion

Additionally, we disagree with the First District's determination that section 161.191(2)

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[15] It is not clear from the record whether or not the ECL recorded in this case represents the pre-hurricane MHWL. If it represents the pre-hurricane MHWL, there would be no difference between the boundary under the common law and the boundary under the Act. In contrast, if the ECL does not represent the pre-hurricane MHWL, the resulting boundary between sovereignty and private property might result in the State laying claim to a portion of land that, under the common law, would typically remain with the private owner. However, because STBR alleges what is essentially a facial challenge, it is unnecessary for this Court to address this as-applied issue. Indeed, it is possible that STBR is without standing to raise this as-applied issue since its resolution might depend upon the assessment of particular facts and defenses inuring to each parcel and each individual owner. See Fla. Home Builders Ass'n v. Dep't of Labor & Employment Sec., 412 So. 2d 351, 353 (Fla. 1982) (delineating the test for associational standing); Palm Point Prop. Owners' Ass'n v. Pisarski, 626 So. 2d 195 (Fla. 1993) (holding that a homeowners association lacks associational standing to enforce restrictive covenants applicable to its members' properties).

results in a facial and unconstitutional taking of the littoral right of accretion. We do not find the littoral right to accretion applicable in the context of this Act.

As we explained earlier, the right to accretion under Florida common law is a contingent right. It is a right that arises from a rule of convenience intended to balance public and private interests by automatically allocating small amounts of gradually accreted lands to the upland owner without resort to legal proceedings and without disturbing the upland owner's rights to access to and use of the water. See Medeira Beach, 272 So. 2d at 212-13; Mexico Beach Corp. v. St. Joe Paper Co., 97 So. 2d 708, 710 (Fla. 1st DCA 1957); see generally 1 Henry Philip Farnham, The Law of Waters and Water Rights § 71, at 326 (1904).

As discussed above, "[t]here are four reasons for the doctrine of accretion:"

> (1) [D]e minimis non curat lex; (2) he who sustains the burden of losses and of repairs imposed by the contiguity of waters ought to receive whatever benefits they may bring by accretion; (3) it is in the interest of the community that all land have an owner and, for convenience, the riparian is the chosen one; (4) the necessity for preserving the riparian right of access to the water.

Medeira Beach, 272 So. 2d at 212-13.

None of these doctrinal reasons apply here. First, the beach restoration provisions of the Act do not apply to situations involving de minimis additions or losses of land. See §§ 161.088, 161.101(1). More specifically, critically eroded shorelines can hardly be characterized as trifles with which the law does not concern itself. Cf. Black's Law Dictionary (8th ed. 2004) (defining "de minimis" as "trifling; minimal" and "so insignificant that a court may overlook it in deciding an issue or case"). Similarly, the beach renourishment itself is a change to the shoreline that is more than de minimis. Second, by authorizing the creation of a buffer area of beach on sovereignty land, the Act removes the upland owner's concomitant risk of losses and repairs due to erosion. After renourishment, the risk of loss and repair lies more with the State than with the upland owner. Third, all land has an owner under the Act because the property line between private and public land is clearly and conveniently fixed at the ECL. See § 161.191(1). Fourth, the upland owner's littoral right of access is preserved under the Act. See § 161.201. Consequently, the common law rule of accretion, which is intended to balance private and public interests, is not implicated in the context of this Act.

Having explained our disagreement with the First District regarding the right to accretion, we now discuss the First District's analysis of the supposed independent right of contact with the water.

(3) Contact is Ancillary to the Littoral Right of Access

The First District concluded that, under section 161.191(1), upland owners "lose the right to have the property's contact with the water remain intact." Save Our Beaches, 31 Fla. L. Weekly at D1177. However, under Florida common law, there is no independent right of contact with the water. Instead, contact is ancillary to the littoral right of access to the water.

The ancillary right to contact with the water exists to preserve the upland owner's core littoral right of access to the water. See Sand Key, 512 So. 2d at 936 (stating that littoral property rights include "the right of access to the water, including the right to have the property's contact with the water remain intact"); see also Farnham, supra, § 62 ("The riparian owner is also entitled to have his contact with the water remain intact. This is what is known as the right of access."). We have never addressed whether littoral rights are unconstitutionally taken based solely upon the loss of an upland owner's direct contact with the water. But we have held that littoral rights are unconstitutionally taken when sovereignty lands are used in a way that deprives the upland owner of the right of access to the water. See Thiesen, 78 So. at 501 (finding that legislation allowing railway on sovereignty submerged lands unconstitutionally deprived upland owner of ingress and egress, i.e., access to the water, without just compensation); see also Webb, 82 So. 2d 743 (finding that fill across small arm of lake constituted an infringement of upland owner's littoral right to access main part of lake); Ferry Pass, 48 So. at 646 (stating that the use

of a river that deprived riparian owner of access to the water may be enjoined).

In this case, the Act expressly protects the right of access to the water, which is the sole justification for the subsidiary right of contact. The Act preserves the rights of ingress and egress and prevents the State from erecting structures upon the beach seaward of the ECL except as required to prevent erosion. See § 161.201. The Act also provides that the State has no intention "to extend its claims to lands not already held by it or to deprive any upland or submerged land owner of the legitimate and constitutional use and enjoyment of his or her property." § 161.141. At least facially, these provisions ensure that the upland owner's access to the water remains intact. Therefore, the rationale for the ancillary right to contact is satisfied.

Furthermore, it is important to understand that contrary to what might be inferred from the First District's conclusion regarding contact, there is no littoral right to a seaward boundary at the water's edge in Florida. Rather, as explained previously, the boundary between sovereignty lands and private uplands is the MHWL, which represents an average over a nineteen-year period. Although the foreshore technically separates upland property from the water's edge at various times during the nineteen-year period, it has never been considered to infringe upon the upland owner's littoral right of access, which the ancillary right to contact is meant to preserve. Admittedly, the renourished beach may be wider than the typical foreshore, but the ultimate

result is the same.[16] Direct access to the water is preserved under the Act. In other words, because the Act safeguards access to the water and because there is no right to maintain a constant boundary with the water's edge, the Act, on its face, does not unconstitutionally eliminate the ancillary right to contact.

Lastly, we briefly explain our disagreement with the First District's use of Belvedere to discount the Act's express preservation of littoral rights in section 161.201.

(4) Belvedere

In its opinion, the First District concluded that "Belvedere controls by explicitly holding that [littoral] rights cannot be constitutionally reserved to the landowners as described in section 161.201." 31 Fla. L. Weekly at D1177. Contrary to the First District, we do not find our decision in Belvedere controlling or even particularly relevant.

In Belvedere, the Department of Transportation sought to acquire uplands in fee

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[16] Of course, the State is not free to unreasonably distance the upland property from the water by creating as much dry land between upland property and the water as it pleases. There is a point where such a separation would materially and substantially impair the upland owner's access, thereby resulting in an unconstitutional taking of littoral rights. See Lake Islands, 407 So. 2d 189; Webb, 82 So. 2d 743; cf. Duval, 77 So. 2d 431.

simple absolute, while expressly reserving the littoral rights to the former upland owners. 476 So. 2d at 649. The Department severed the littoral rights in an attempt to limit the compensation for uplands in eminent domain proceedings. In Belvedere, we were particularly concerned that the former upland owners did not have the actual ability to exercise any of their reserved littoral rights since they held no easement or right to enter upon their former land. See Id. at 651 (quoting Belvedere Dev. Corp. v. Div. of Admin., 413 So. 2d 847, 851 (Fla. 4th DCA 1982) (Hersey, J., specially concurring)). Therefore, we held in Belvedere that littoral rights "cannot be severed by condemnation proceedings without the consent of the upland owner." Id. at 653. In so holding, we emphasized that our decision was limited to the context of condemnation of upland property. See Id. at 652.

This case is clearly distinguishable from Belvedere. STBR is not arguing that the Act necessitates the condemnation of uplands. Thus, our holding that was limited to the context of condemnation of upland property is inapplicable. Furthermore, in contrast to the circumstances of Belvedere, upland owners under the Act continue to have the ability to exercise their littoral rights to access, use, and view. See §§ 161.201; 161.141. Given these significant differences, Belvedere does not apply here.

III. CONCLUSION

As we have explained, the Beach and Shore Preservation Act effectuates the State's constitutional duty to protect Florida's beaches.

And, like Florida common law, the Act facially achieves a reasonable balance between public and private interests in the shore. Specifically, the Act benefits upland owners by restoring lost beach, by protecting their property from future storm damage and erosion, and by preserving their littoral rights to use and view. The Act also benefits upland owners by protecting their littoral right of access to the water, which is the sole justification for the ancillary right of contact. Additionally, the Act authorizes actions to reclaim public beaches that are also authorized under the common law after an avulsive event. Furthermore, the littoral right to accretion is not implicated by the Act because the reasons underlying this common law rule are not present in this context.

In light of the above, we find that the Act, on its face, does not unconstitutionally deprive upland owners of littoral rights without just compensation. Consequently, we answer the rephrased certified question in the negative and quash the decision of the First District. And we again emphasize that our decision in this case is strictly limited to the context of restoring critically eroded beaches under the Beach and Shore Preservation Act.

It is so ordered.

(QUINCE, C.J., ANSTEAD and PARIENTE, JJ., and CANTERO, Senior Justice, concur.
WELLS, J., dissents with an opinion.
LEWIS, J., dissents with an opinion.)

(WELLS, J., dissenting.)

I would answer the certified question in the affirmative. I would approve the decision of the First District Court of Appeal.

I am in substantial agreement with the conclusions of Justice Lewis in his dissenting opinion. Since the district court dealt with this case as an applied constitutional challenge, I think we must also do so.

It appears to me that this Court's precedent controlling this case is in State v. Florida National Properties, Inc., 338 So. 2d 13 (Fla. 1976); Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Associates, Ltd., 512 So. 2d 934 (Fla. 1987); and Belvedere Development Corp. v. Department of Transportation, 476 So. 2d 649 (Fla. 1985).

There can be no doubt that beach restoration is of critical and vital interest in Florida. However, the legislative setting of this erosion control line does eliminate valuable property rights which have been recognized by this Court. Thus, the act can be saved by the payment of just compensation but cannot be constitutionally applied without it.

(LEWIS, J., dissenting.)

I cannot join the majority because of the manner in which it has "butchered" Florida law in its attempted search for equitable answers to several issues arising in the context of beach restoration in Florida. In attempting to answer these questions,

the majority has, in my view, unnecessarily created dangerous precedent constructed upon a manipulation of the question actually certified. Additionally, I fear that the majority's construction of the Beach and Shore Preservation Act is based upon infirm, tortured logic and a rescission from existing precedent under a hollow claim that existing law does not apply or is not relevant here. Today, the majority has simply erased well-established Florida law without proper analysis, and has further disregarded the manner in which the parties pled, and the lower court analyzed, an as-applied constitutional challenge. As the majority recognizes, the local governmental entities have yet to properly establish that the erosion-control line ("ECL") represents the pre-avulsion or pre-critical-erosion mean high-water line ("MHWL"), which in my view, is a critical factor in determining whether the State and local governmental entities have constitutionally applied the Act to the six property-owner members of Stop the Beach Renourishment, Inc. ("STBR").[17]

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[17] Below, unchallenged testimony established that each of these members owned gulf-front property within the area affected by the restoration and renourishment project. As the First District observed:

> [A]ll of the individual members . . . own property in the affected area. Competent substantial evidence for this factual finding by the [administrative-law judge] is found in the unrebutted testimony of Mr. Slade Lindsey, one of the six members. Mr. Lindsey testified that all six members owned waterfront property, up to the mean high

First, the logic upon which the entire foundation of the majority opinion is based inherently assumes that contact with the particular body of water has absolutely no protection and is just some ancillary concept that tags along with access to the water and seemingly possesses little or no independent significance. I could not disagree more. By essential, inherent definition, riparian and littoral property[18] is that which is contiguous to,[19] abuts,[20] borders,[21] adjoins,[22] or touches water. See,

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> water line, in the area of the proposed project. The ALJ found that all six members would be affected by the project if it significantly reduced water quality, infringed on [littoral] rights, or proceeded without their required consent . . . .

Save Our Beaches, Inc. v. Fla. Dep't of Envtl. Prot., 31 Fla. L. Weekly D1173, D1175, 2006 WL 1112700, at *6 (Fla. 1st DCA Apr. 28, 2006).

[18] "Riparian" generally refers to land touching a river or stream, and "littoral" generally refers to land touching the ocean, a sea, or a lake; however, our case law and the Florida Statutes often use the terms interchangeably.

[19] "Contiguous, adj.: 1. Touching at a point or along a boundary." Black's Law Dictionary 338 (8th ed. 2004).

[20] "Abut, vb.: To join at a border or boundary; to share a common boundary wi th." Black's Law Dictionary 11 (8th ed. 2004).

[21] "Border, vb.: 2. [T]o touch at the edge or boundary." Merriam Webster's Collegiate Dictionary 133 (10th ed. 1993).

e.g., Brickell v. Trammel, 82 So. 221, 229-30 (Fla. 1919) (explaining that under Spanish civil law and English common law, private littoral ownership extended to the high-water mark); Miller v. Bay-to-Gulf, Inc., 193 So. 425, 427 (Fla. 1940) ("[I]t is essential that [the property owners] show the ordinary high water mark or ordinary high tide of the Gulf of Mexico extended to their westerly boundary in order for them to be entitled to any sort of [littoral] rights . . . ." (emphasis supplied)); Thiesen v. Gulf, Fla. & Ala. Ry. Co., 78 So. 491, 500 (Fla. 1918) ("At common law lands which were bounded by and extended to the high-water mark of waters in which the tide ebbed and flowed were riparian or littoral to such waters." (emphasis supplied)). In this State, the legal essence of littoral or riparian land is contact with the water. Thus, the majority is entirely incorrect when it states that such contact has no protection under Florida law and is merely some "ancillary" concept that is subsumed by the right of access. In other words, the land must touch the water as a condition precedent to all other riparian or littoral rights and, in the case of littoral property, this touching must occur at the MHWL.

I agree with former Judge Hersey of the Fourth District Court of Appeal, who urged this Court to take action in Belvedere Development Corp. v. Division of Administration, 413 So. 2d 847 (Fla. 4th DCA 1982):

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[22] "Adjoining, adj.: Touching; sharing a common boundary." Black's Law Dictionary 44 (8th ed. 2004).

> To speak of riparian or littoral rights unconnected with ownership of the shore is to speak a non sequitur. Hopefully, the Supreme Court will take jurisdiction and extinguish this rather ingenious but hopelessly illogical hypothesis.

Id. at 851 (Hersey, J., specially concurring) (emphasis supplied). Later, this Court did act in Belvedere and agreed with Judge Hersey, quoting parts of his opinion at length. See Belvedere Dev. Corp. v. Dep't of Transp., 476 So. 2d 649, 651-52 (Fla. 1985). Most assuredly, Belvedere established clear principles of law with regard to riparian and littoral property, which the majority views as an inconvenient detail of Florida legal precedent and simply unnecessarily discards with one sentence and no analysis as not "controlling or even particularly relevant." Majority op. at 35. Notwithstanding its apparent inconvenience to the majority, Belvedere continues to stand for the principle of law that riparian or littoral rights are generally inseparable from riparian or littoral uplands in this State. See 476 So. 2d at 651-52; see also § 253.141(1), Fla. Stat. (2005) ("Riparian rights . . . are appurtenant to and are inseparable from the riparian land." (emphasis supplied)). Today, the majority has returned to a "hopelessly illogical hypothesis" without even an attempt to advance some rational analysis that conforms to the Florida Constitution, our common law, and section 253.141, Florida Statutes.

Following Belvedere only a short two years later, this Court again directly addressed the

fundamental principles of law applicable to riparian and littoral property, its owners, and their correlative rights in Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Associates, Ltd., 512 So. 2d 934 (Fla. 1987). In very clear and unmistakable language, we stated:

> This Court has expressly adopted the common law rule that a riparian or littoral owner owns to the line of the ordinary high water mark on navigable waters. We have also held that riparian or littoral rights are legal rights and, for constitutional purposes, the common law rights of riparian and littoral owners constitute property. Riparian and littoral property rights consist not only of the right to use the water shared by the public, but include the following vested rights: (1) the right of access to the water, including the right to have the property's contact with the water remain intact . . . .

Id. at 936 (citations omitted) (emphasis supplied). The majority now avoids this inconvenient principle of law -- and firmly recognized and protected property right -- by improperly describing the littoral property and its owner as having "no independent right of contact with the water," and by mischaracterizing the significant right of contact as being only "ancillary" to the right of access. Majority op. at 32 (emphasis supplied). Any claim that this existing precedent and law does not apply here is based upon empty, misguided logic that discounts

the essential nature of littoral property. At least in theory, the MHWL is the location at which littoral property contacts the sea,[23] and even the majority seems to accept this principle. As a definitional matter, without such contact with the water, littoral property does not exist in Florida. See, e.g., Ferry Pass Inspectors' & Shippers' Ass'n v. White River Inspectors' & Shippers' Ass'n, 48 So. 643, 644 (Fla. 1909) ("Riparian rights are incident to the ownership of lands contiguous to and bordering on navigable waters. The common-law rights of riparian owners with reference to the navigable waters are incident to the ownership of the uplands that extend to [the] high-water mark." (emphasis supplied)); § 253.141(1), Fla. Stat. (2005) ("Riparian rights are those incident to land bordering upon navigable waters. . . . The land to which the owner holds title must extend to the ordinary high watermark of the navigable water in order that riparian rights may attach." (emphasis supplied)); cf. art. X, § 11, Fla. Const. ("The title to lands under navigable waters, within the boundaries of the state, which have not

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[23] Section 177.27(15)-(16), Florida Statutes (2005), provides the following relevant definitions:

> "Mean high water" means the average height of the high waters over a 19-year period. For shorter periods of observation, "mean high water" means the average height of the high waters after corrections are applied to eliminate known variations and to reduce the result to the equivalent of a mean 19-year value.

"Mean high-water line" means the intersection of the tidal plane of mean high water with the shore.

been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people." (emphasis supplied)). Although the MHWL may be a "dynamic" boundary, until today, Florida has judicially and legislatively accommodated these variations without emasculating the underlying private-property rights and ownership principles. Our common law, statutes, and Constitution indicate that the right of contact with the water is neither "independent of," nor "ancillary to," riparian and littoral property, its ownership, and associated protected rights. That contact is inherent in, and essential to, the very heart of the property we discuss. Without bordering on, lying contiguous to, or abutting the water, the property ceases to be "riparian" or "littoral" by working definition:

> The ordinary high water mark is well established as the dividing line between private riparian and sovereign or public ownership of the land beneath the water. This dividing line was not chosen arbitrarily. . . . "Any other rule would leave riparian owners continually in danger of losing access to water which is often the most valuable feature of their property, and continually vulnerable to harassing litigation challenging the location of the original water lines."

Bd. of Trs. of the Internal Improvement Fund v. Medeira Beach Nominee, Inc., 272 So. 2d 209, 213 (Fla. 2d DCA 1973) (quoting Hughes v. Washington,

389 U.S. 290, 293-94 (1967)); see also § 253.141(1), Fla. Stat. (2005).

The problem with the underlying logic and reasoning of the majority is not really a matter of just a few yards of sand but is, instead, its failure to acknowledge and account for the fundamental result that occurs in the absence of the inherent right of contact with the water. Under the legal principle adopted by the majority, the Sovereign could now create, widen, and extend "sovereign" land or a portion of beach between what should represent the status-quo-ante MHWL (also known as the ECL) and the water by hundreds or even thousands of yards without impacting the rights of riparian or littoral property owners. This new-found governmental power could be used to create extended state-owned or sovereign lands between the once-private riparian or littoral property and the water, thereby effectively severing private property from the sea, lakes, and rivers, which instantly converts ocean-front, gulf-front, lake-front, and river-front property into something far less.[24] The protection of property

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[24] In response, the majority states:

> Of course, the State is not free to unreasonably distance the upland property from the water by creating as much dry land between upland property and the water as it pleases. There is *a point* where such a separation would materially and substantially impair the upland owner's access, thereby resulting in an unconstitutional taking of littoral rights.

rights in Florida is an essential element of our organic law, finding a home in multiple constitutional provisions. See, e.g., art. I, §§ 2, 9, Fla. Const. In a similar manner, there are constitutional limitations upon any encroachment on our property rights. See art. X, § 6, Fla. Const. In this context, we have recognized the property value of contact with the water:

> The fronting of a lot upon a navigable stream or bay often constitutes its chief value and desirability, whether for residence or business purposes. The right of access to the property over the waters, the unobstructed view of the bay, and the enjoyment of the privileges of the waters incident to ownership of the bordering land would not, in many cases, be exchanged for the price of an inland lot in the same vicinity. In many

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Majority op. at 34 n.16 (emphasis supplied). However, the majority never provides any guidance or a limiting principle concerning when governmental creation of new land seaward of the ECL would reach "a point" that materially impaired the upland owners' littoral rights. Further, the majority's interpretation of the Act is completely unsupported by Florida law, which provides that the right of contact is a condition precedent to all other littoral rights.

Notwithstanding its protestations to the contrary, the majority's analysis thus destroys the foundation of all other littoral and riparian rights in Florida -- the right of contact with the water. Further, despite the majority's efforts to marginalize this right, contact with the water demands protection under Florida law because it is part of our system of private-property ownership.

> cases, doubtless, the riparian rights incident to the ownership of the land were the principal, if not sole, inducement leading to its purchase by one and the reason for the price charged by the seller.

Thiesen, 78 So. at 507 (emphasis supplied).

In addition to discounting the right of contact with the water, the majority skims the law with regard to riparian and littoral property ownership, and associated rights, to proceed into a discussion of erosion, accretion, reliction, and avulsion as though those concepts provide the end-all-be-all response to every question of riparian and littoral property rights. Although the Sovereign may have the right to reclaim land lost through an avulsive event, the littoral-upland property owner also maintains property rights to land submerged through avulsion. See State v. Fla. Nat'l Props., Inc., 338 So. 2d 13, 18-19 (Fla. 1976). The upland owner continues to hold private-property rights to the extent and location of the MHWL as it existed before the storm (i.e., the avulsive event). In fact, even the majority affirmatively states: "Consequently, if the shoreline is lost due to an avulsive event, the public [through the Sovereign] has the right to restore its shoreline up to that MHWL." Majority op. at 28 (emphasis supplied). The majority opinion is actually replete with inconsistent principles. However, this particular recognition creates an internal inconsistency within the majority opinion because the opinion also states that there is no right for the littoral-upland property owner to contact the sea at

the MHWL. The majority adds to this confusion when it recognizes that "when restoring storm-ravaged shoreline, the boundary under the Act should remain the pre-avulsive event boundary." Id. at 29 (emphasis supplied). Such language indicates that even the majority recognizes the definitional, essential requirement in Florida that littoral property does not exist in the absence of contact with the sea at the MHWL, and that this requirement and right continues "under the Act." This position directly conflicts with its unfounded contention that "there is no independent right of contact with the water." Id. at 31.

The majority thus overlooks that the State may only restore the beach to the pre-avulsion or pre-critical-erosion MHWL because of the quintessential aspect of littoral property under Florida law. As the Sovereign, the State owns the foreshore in trust for the public, which is the land between the MHWL and the low-water mark, while, in contrast, the littoral-upland holder's ownership continues until, and includes, the MHWL. See, e.g., White v. Hughes, 190 So. 446, 449 (Fla. 1939); see also art. X, § 11, Fla. Const; § 253.141(1), Fla. Stat. (2005); § 161.141, Fla. Stat. (2005) ("[T]here is no intention on the part of the state to extend its claims to lands not already held by it or to deprive any upland or submerged land owner of the legitimate and constitutional use and enjoyment of his or her property." (emphasis supplied)). Thus, the decision of the majority to grant the Sovereign the property right or authority to sever once riparian or littoral property from the water by creating as much dry land between the property and the water as the

government may please is inconsistent with maintaining the MHWL. This separation may be de minimis, or a matter of a few yards, but it could also be a matter of hundreds or even thousands of yards upon application of the principle announced today that waterfront property does not enjoy the protection of a continuing right of contact with the water. Under the majority's analysis, this State has ceased to protect the condition precedent to all other littoral rights: contact with the sea.

Unlike the majority, I would not interpret the Act to permit a result that destroys the essential nature of riparian or littoral property. If a beach were restored and renourished without altering the location of the pre-critical-erosion MHWL (i.e., refilling only to restore the MHWL to the ECL), the Act could be applied without unconstitutionally severing riparian or littoral property from its contact with the water. In contrast, restoration and renourishment in the form of filling currently submerged property to separate riparian or littoral property from the resulting MHWL simply violates all prior notions of waterfront property rights in Florida. See, e.g., Sand Key, 512 So. 2d at 936; Kendry v. State Road Dep't of Fla., 213 So. 2d 23, 27-28 (Fla. 4th DCA 1968); § 253.141(1), Fla. Stat. (2005).

I suggest that contact with the water by riparian or littoral property is not ancillary, independent, or subsidiary to such property but is essential and inherent to its legal definition and is an indispensable predicate for the private owners' possession of other associated rights. Accordingly, I

cannot agree that the Sovereign may create a substantially wider "foreshore," which unnecessarily destroys the inherent and essential nature of riparian and littoral property along with valuable property rights. Under our common law, article X, section 11 of the Florida Constitution, and section 253.141, Florida Statutes, the Sovereign only owns the land between the MHWL and the low-water mark (along with the land under navigable waters), and the private littoral-upland owner owns the land up to, and including, the MHWL. I would not interpret the Act to contradict this prior-existing, foundational law.

In contrast, the majority has done just that and, in the process, has destroyed the inherent and essential nature of privately held littoral property -- contiguity with the sea. Furthermore, the majority has also transformed the certified question from one of constitutionality "as applied" to one of "facial validity." See majority op at 2. If the Court construed the Act in a manner that did NOT sever riparian or littoral property from the water, we could maintain its facial validity. Therefore, the Act may be applied constitutionally, but not in the manner espoused by the majority.

Under appropriate circumstances (e.g., where the ECL does not correspond to the restored MHWL), the property owners should retain the right to bring as-applied challenges to this beach-restoration project. See art. X, § 6, Fla. Const. (stating that the government will not take private property without providing full compensation); § 161.212, Fla. Stat. (2005) (indicating that the

provisions and remedies provided in the Act are "cumulative and shall not . . . abrogate any other remedies provided by law"). That appears to be precisely what occurred in this case. Below, STBR challenged the local governmental entities' placement of the ECL[25] and, here, the majority recognizes that it is unclear whether the ECL represents the status-quo-ante MHWL. See majority op. at 29 n.15. Further, although the majority mischaracterizes this action as a facial challenge, it states that "if the ECL does not represent the pre-hurricane MHWL, the resulting boundary between sovereignty and private property might result in the State laying claim to a portion of land that, under the common law, would typically remain with the private owner." Id. Such state action constitutes a compensable taking, and therefore I dissent with regard to the majority's reversal of the First District and its mischaracterization of this action as a facial challenge. In spite of the majority's desire to destroy protected private-property rights, nothing in its opinion -- which addresses a judicially rewritten facial challenge -- prevents these property owners from bringing later as-applied challenges to this beach-restoration project.

Here, by disclaiming (1) any interest in land that it does not already own "as sovereign titleholder"[26] and (2) any intent to deprive property

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[25] See Save Our Beaches, 31 Fla. L. Weekly at D1173.

[26] § 161.151(3), Fla. Stat. (2005); see also § 161.141, Fla. Stat. (2005).

owners of their littoral rights (other than accreted portions of land which the State may readjust to maintain the reestablished MHWL at the recorded ECL),[27] the State could sustain the common-law rule and remain true to its definition of littoral and riparian rights contained within section 253.141(1), Florida Statutes: "The land to which the owner holds title must extend to the ordinary high watermark of the navigable water in order that riparian [or littoral] rights may attach." § 253.141(1), Fla. Stat. (2005) (emphasis supplied). If the State or applicable "governmental agency" does not carry out its statutory duty to maintain the reestablished MHWL at the ECL through renourishment efforts, it risks returning the shore to its pre-restoration status, which means that the MHWL would naturally move away from the ECL and contiguous ownership would remain with the littoral-upland owners, not the State. See art. X, § 11, Fla. Const; §§ 161.211(2)-(3), 253.141(1), Fla. Stat. (2005).

Thus, if the State and our local governments restore and renourish our beaches so that the reestablished MHWLs remain at the ECLs, which may involve additional redistributions of accreted and eroded sand, then they could apply the Act in a constitutional manner because littoral property would retain its required contact with the sea.[28] Any

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[27] See §§ 161.141, 161.191, 161.201, Fla. Stat. (2005).

[28] Based on this analysis, the Act may be subject to a facial construction that preserves its constitutionality (although it was applied in an unconstitutional manner in this case). However, I cannot help but observe that the Legislature could have largely avoided any dispute in this context if it

other interpretation of this legislation would lead to several constitutional problems with regard to uncompensated takings. I cannot endorse any construction of the Act that creates, rather than alleviates, constitutional concerns.

I recognize that beach restoration and renourishment are critical in Florida and present many difficult and complex issues. I have no doubt that the majority has attempted to balance the respective interests involved to reach a workable solution. However, this legislation has not been constitutionally applied in this case, and no matter the complexity or difficulty, I suggest that the private-property rights destroyed today are also critical and of fundamental importance. As constitutionally protected rights slide, it becomes more difficult to protect others. The rights inherent in private-property ownership are at the foundation of this nation and this State. I simply cannot join a decision which, in my view, unnecessarily eliminates private-property rights without providing "full

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had simply produced legislation that did not require it to take title to land for the purposes of restoring and renourishing Florida's beaches.

The same objective could be accomplished through the deposit of sand on the relevant beach with the understanding that the dividing line between sovereign and private lands would remain the dynamic MHWL. This would cost the State, our local governments, and Florida's taxpayers far less capital by avoiding the constant need to redistribute sand to maintain the restored MHWL at the recorded ECL or the need to exercise eminent-domain powers.

compensation" as required by article X, section 6 of the Florida Constitution. While the Act was applied in an unconstitutional manner here, it may be constitutionally applied under other circumstances in a manner that preserves both the intent of the Legislature and the quintessential nature of littoral and riparian property in Florida.

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

SAVE OUR BEACHES, INC.
and STOP THE BEACH
RENOURISHMENT, INC.,

Appellants,

v. CASE NO. 1D05-4086

FLORIDA DEPARTMENT OF
ENVIROMENTAL PROTECTION,
THE BOARD OF TRUSTEES OF
THE INTERNAL IMPROVEMENT
TRUST FUND, CITY OF DESTIN,
and WALTON COUNTY,

Appellees.

_____/

Opinion filed July 3, 2006.

An appeal from an order of the Department of Environmental Protection.

Richard S. Brightman and D. Kent Safriet of Hopping Green & Sams, P.A., Tallahassee, for Appellants.

Gregory M. Munson, General Counsel, and Charles T. "Chip" Collette and Mark S. Miller, Senior Assistant General Counsels, Florida Department of Protection, Tallahassee; Kenneth J. Plante, Kelly B.

Plante, and Tana D. Storey of Roetzel & Andress, L.P.A., Tallahassee, for Appellees.

POLSTON, J.

On Motions for Rehearing, Rehearing En Banc, and/or for Certification

Appellees' motions for rehearing and rehearing en banc are denied. Appellees' motions for certification are granted to the extent that we certify the following question to be of great public importance:

> ***Has Part I of Chapter 161, Florida Statutes (2005), referred to as the Beach and Shore Preservation Act, been unconstitutionally applied so as to deprive the members of Stop the Beach Renourishment, Inc. of their riparian rights without just compensation for the property taken, so that the exception provided in Florida Administrative Code Rule 18-21.004(3), exempting satisfactory evidence of sufficient upland interest if the activities do not unreasonably infringe on riparian rights, does not apply?***

KAHN, C.J. and LEWIS, J., CONCUR.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

SAVE OUR BEACHES, INC.
and STOP THE BEACH
RENOURISHMENT, INC.,

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FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
THE BOARD OF TRUSTEES OF
THE INTERNAL IMPROVEMENT
TRUST FUND, CITY OF DESTIN,
and WALTON COUNTY,

Appellees.

Opinion filed April 28, 2006.

An appeal from an order of the Department of Environmental Protection.

POLSTON, J.

Appellants challenge a July 27, 2005 final order entered by appellee Florida Department of Environmental Protection, determining that a Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands, that allows the renourishment of 6.9 miles of beaches and dunes within the City of Destin and Walton County, was properly issued.

Appellants argue that the final order unconstitutionally applies Part I of Chapter 161, Florida Statutes (2005), referred to as the Beach and Shore Preservation Act. We agree that constitutionally protected riparian rights have been deprived without just compensation for the property taken, therefore, we reverse and remand.

I. BACKGROUND

A. The Project

The Gulf of Mexico beaches of the City of Destin and Walton County were critically eroded by Hurricane Opal in 1995. The erosion problem was identified by the Department, which placed these beaches on its list of critically-eroded beaches. Destin and Walton County then initiated a lengthy process of beach restoration through renourishment. The process, which included extensive studies and construction design and pre-application conferences with Department staff, culminated in the filing of an Application for a Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands on July 30, 2003.

The application proposed to dredge sand from an ebb shoal borrow area south of East Pass in eastern Okaloosa County, using either a cutter head dredge (which disturbs the sand on the bottom of the borrow area and vacuums it into a pipeline which delivers it to the project area) or a hopper dredge (which fills itself and is moved to the project site). On the project site, heavy equipment moves the dredged sand as specified in the design plans. The project is executed in this manner and progresses

along the beach, usually at a pace of about 300 to 500 feet a day. Each day work is in progress, public access to the beach is restricted for a length of about 500 to 1,000 feet in the immediate vicinity of the area of beach being worked.

After requests for additional information and responses to those requests, the Department issued a Notice of Intent to Issue the permit, DEP JCP File No. 0218419-001-JC (Draft Permit), on July 15, 2004. Appellants Save Our Beaches, Inc. and Stop the Beach Renourishment, Inc. timely filed a petition for formal administrative hearing challenging issuance of the Draft Permit. Stop the Beach Renourishment also filed a petition for formal administrative hearing challenging the county erosion control line established by the Board of Trustees of the Internal Improvement Fund, in conjunction with the proposed beach restoration project. The two cases were consolidated for administrative hearing.

Appellants' constitutional challenges were deferred for determination in court proceedings. The issues in the administrative hearing were whether Destin and Walton County gave reasonable assurance that applicable water quality standards will not be violated and whether Destin and Walton County have obtained, or are able to obtain, all requisite private property rights necessary to implement the proposed project. In the recommended order, the administrative law judge ("ALJ") found that Destin and Walton County gave reasonable assurances that the applicable water quality standard will not be violated. That water

quality finding was adopted by the Department in its final order and this finding was not challenged by appellants on appeal.

On June 30, 2005, the ALJ recommended that the Department enter a final order issuing the permit. The Department entered its final order on July 27, 2005, determining that the Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands was properly issued pursuant to existing statutes and rules.

B. Applicable Statutes and Rules

The Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands includes two separate permits and an authorization. The two permits are (i) a coastal construction permit issued pursuant to Chapter 161, Florida Statutes[1], and

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[1] Unless otherwise noted, all statutes and rules referenced are to 2005, when the administrative proceeding concluded. See Fla. Admin. Code Rules 18-21.00401(5) and 62-312.065(5); Laveria v. Dep't of Prof'l Regulation, Bd.of Med., 616 So.2d 53, 53-54 (Fla. 1st DCA 1993) (stating that "Florida follows the general rule that a change in a licensure statute that occurs during the pendency of an application for licensure is operative as to the application, so that the law as changed, rather than as it existed at the time the application was filed, determines whether the license should be granted"); 51 Am. Jr. 2d Licenses and Permits § 79 (2005) (stating, "[i]n general, a change in the law pending an application for a permit or license is operative as to the application, so that the law as changed, rather than as it existed at the time the application was filed, determines whether the permit or license should be granted"). There have been no applicable susbstantive changes in the

Florida Administrative Code Chapter 62B-41, and (ii) a wetland/environmental resource permit issued pursuant to Chapter 373, Florida Statutes, and Florida Administrative Code Chapter 62-312. The authorization includes a proprietary authorization to use sovereign submerged lands, pursuant to Chapter 253, Florida Statutes, and Florida Administrative Code Chapter 18-21.

Florida Administrative Code Chapter 62B-49, entitled "Joint Coastal Permits and Concurrent Processing of Proprietary Authorizations," does not change the substantive requirements for obtaining these two permits and authorization, but provides a procedural mechanism for processing all three components of the joint coastal permit and authorization at the same time. Rule 62B-49.001 provides in pertinent part that proprietary authorizations pursuant to Florida Administrative Code Chapter 18-21 are applicable to the review of joint coastal permits. The relevant part of Rule 18-21.004(3) provides:

> Riparian Rights.
> (a) None of the provisions of this rule shall be implemented in a manner that would unreasonably infringe upon the traditional, common law riparian rights, as defined in Section 253.141, F.S., of upland property owners adjacent to sovereignty submerged lands.

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relevant statutes and rules since the application was filed in 2003.

> (b) Satisfactory evidence of sufficient upland interest is required for activities on sovereignty submerged lands riparian to uplands, unless otherwise specified in this chapter. Public utilities and state and other governmental agencies proposing activities such as utility lines, roads or bridges must obtain satisfactory evidence of sufficient upland interest prior to beginning construction, but need not provide such evidence as part of any required application. Satisfactory evidence of sufficient upland interest is not required for activities on sovereignty submerged lands that are not riparian to uplands, or when a governmental entity conducts restoration and enhancement activities, provided that such activities do not unreasonably infringe on riparian rights.

Fla. Admin. Code R. 18-21.004(3) (emphasis added).

Appellants argued in the administrative proceeding that Destin and Walton County did not provide "satisfactory evidence of sufficient upland interest."[2] The ALJ ruled that such evidence was not

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[2] Florida Administrative Code Rule 18-21.003(55) defines "satisfactory evidence of sufficient upland interest" as: "documentation, such as warranty deed; a certificate of title issued by a clerk of the court; a lease; an easement; or condominium, homeowners or similar association documents that clearly demonstrate that the holder has control and

necessary because the application "falls squarely within the exception in the last sentence of Rule 18-21.004(3)(b), supra: no evidence of an upland interest is necessary 'provided that such activities do not unreasonable infringe on riparian rights.' "

The Department adopted the ALJ's ruling that the project does not unreasonably infringe on riparian rights. The ALJ noted that the right to accretion is a riparian right, but ruled that, under the pertinent statutes, the riparian right to accretions (as well as the risk of erosion) will be eliminated upon recording of the erosion control line required by statute. Section 161.141 provides:

> The Legislature declares that it is the public policy of the state to cause to be fixed and determined, pursuant to beach restoration, beach nourishment, and erosion control projects, the boundary line between sovereignty lands of the state bordering on the Atlantic Ocean, the Gulf of Mexico, or the Straits of Florida, and the bays, lagoons, and other tidal reaches thereof, and the upland properties adjacent thereto; except that such boundary line

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interest in the riparian uplands adjacent to the project area and the riparian rights necessary to conduct the proposed activity. Other forms of documentation shall be accepted if they clearly demonstrate that the holder has control and interest in the riparian uplands adjacent to the project area and the riparian rights necessary to conduct the proposed activity."

shall not be fixed for beach restoration projects that result from inlet or navigation channel maintenance dredging projects unless such projects involve the construction of authorized beach restoration projects. However, prior to construction of such a beach restoration project, the board of trustees must establish the line of mean high water for the area to be restored; and any additions to the upland property landward of the established line of mean high water which result from the restoration project remain the property of the upland owner subject to all governmental regulations and are not to be used to justify increased density or the relocation of the coastal construction control line as may be in effect for such upland property. The resulting additions to upland property are also subject to a public easement for traditional uses of the sandy beach consistent with uses that would have been allowed prior to the need for the restoration project. It is further declared that there is no intention on the part of the state to extend its claims to lands not already held by it or to deprive any upland or submerged land owner of the legitimate and constitutional use and enjoyment of his or her property. If an authorized beach restoration, beach nourishment, and erosion control project cannot reasonably be

> accomplished without the taking of private property, the taking must be made by the requesting authority by eminent domain proceedings.

§ 161.141, Fla. Stat. (2005) (emphasis added).

Section 161.161(3) provides that "[o]nce a project is determined to be undertaken, a survey of all or part of the shoreline within the jurisdiction of the local government in which the beach is located shall be conducted in order to establish the area of beach to be protected by the project and locate an erosion control line." The Board of Trustees "shall approve or disapprove the erosion control line for a beach restoration project," and in locating the line "shall be guided by the existing line of mean high water." See § 161.161(5), Fla. Stat. (2005). Section 161.181 provides that, if no review is taken, or if the Board's decision is upheld on review, the Board shall file its resolution approving the erosion control line in the public records and record the survey showing the area of beach to be protected and the erosion control line in the book of plats of the county or counties where the erosion control line lies.

Significantly, section 161.191 provides that the erosion control line becomes the new property boundary, denying the upland landowners any property gained by accretion:

> (1) Upon the filing of a copy of the board of trustees' resolution and the recording of the survey showing the location of the erosion control line and the area of the beach to be protected as

provided in s. 161.181, title to all lands seaward of the erosion control line shall be deemed to be vested in the state by right of its sovereignty, and title to all lands landward of such line shall be vested in the riparian upland owners whose lands either abut the erosion control line or would have abutted the line if it had been located directly on the line of mean high water on the date the board of trustees' survey was recorded.

(2) Once the erosion control line along any segment of the shoreline has been established in accordance with the provision of ss. 161.141-161.211, the common law shall no longer operate to increase or decrease the proportions of any upland property lying landward of such line, either by accretion or erosion or by any other natural or artificial process, except as provided in s. 161.211(2) and (3). However, the state shall not extend, or permit to be extended through artificial means, that portion of the protected beach lying seaward of the erosion control line beyond the limits set forth in the survey recorded by the board of trustees unless the state first obtains the written consent of all riparian upland owners whose view or access to the water's edge would be altered or impaired.

§ 161.191, Fla. Stat. (2005) (emphasis added).

Notwithstanding the recognition that the upland landowners' titles have been altered by operation of statute, section 161.201 states that the landowners continue to be entitled to all of their riparian rights:

> Any upland owner or lessee who by operation of ss. 161.141-161.211 ceases to be holder of title to the mean high-water line shall, nonetheless, continue to be entitled to all common-law riparian rights except as otherwise provided in s. 161.191(2), including but not limited to rights of ingress, egress, view, boating, bathing, and fishing. In addition the state shall not allow any structure to be erected upon lands created, either naturally or artificially, seaward of any erosion control line fixed in accordance with the provisions of ss. 161.141-161.211, except such structures required for the prevention or erosion. Neither shall such use be permitted by the state as may be injurious to the person, business, or property of the upland owner or lessee; and the several municipalities, counties and special districts are authorized and directed to enforce this provision through the exercise of their respective police powers.

§ 161.201, Fla. Stat. (2005) (emphasis added).

The final order expressly recognized that at least two riparian rights, (i) the right to receive

accretions and relictions to the property, and (ii) the right to have the property's contact with the water remain intact, were eliminated by section 161.191. However, the final order found no "infringement" of these riparian rights. This finding was based solely on the fact that the elimination of these rights was authorized by section 161.191.

The ALJ reasoned, in the recommended order adopted by the Department, that "[s]ince the [p]roject cannot proceed without recording of the established ECL [erosion control line], there will be no infringement of any right to accretion, assuming the constitutionality of these statutes."[3] (Emphasis added). The ALJ, citing Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Associates, Ltd., 512 So. 2d 934, 936 (Fla. 1987), also ruled that the riparian "'right to have the property's contact with the water remain intact' . . . would be eliminated by establishment of the ECL [erosion control line], assuming the constitutionality of the pertinent statutes." The Department, in its final order, essentially ruled that there is no infringement

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[3] The Department assumes the constitutionality of the statutes because it must give full effect to the statutes, rather than question their constitutional validity. See State ex rel. Atl. Coast Line R. Co. v. State Bd. of Equalizers, 94 So. 681, 682 (Fla. 1922) (reasoning that "[e]very law found upon the statute books is presumptively constitutional until declared otherwise by the courts," and that "ministerial officers must obey it, until in a proper proceeding its constitutionality is judicially passed upon").

of any riparian rights because the statutes say there is not.

II. STANDING

A. Administrative Proceeding

Because the constitutional challenge at issue in this case could not be brought in the administrative action, see Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc., 361 So. 2d 695, 699 (Fla. 1978), the only issues heard related to water quality standards and whether Destin and Walton County have obtained, or are able to obtain, all requisite private property rights necessary to implement the proposed project. During the administrative proceeding, appellees challenged appellants' standing to bring the administrative action.

It is undisputed that Save Our Beaches and Stop the Beach Renourishment do not themselves own property in the area affected by the proposed project and will not be otherwise affected by the project. Therefore, their standing is associational and is derived from representation of their members. Both Save Our Beaches and Stop the Beach Renourishment were incorporated not for profit in Florida for the purpose of protecting and defending the natural resources of the beaches, protecting private property rights, and seeking redress of past, present, and future authorized and/or inappropriate beach restoration activities.

Save Our Beaches has approximately 150 members. These members own approximately 112

properties in Destin, consisting of approximately 62 beachfront properties and 50 condominium units of beachfront condominium developments. The ALJ stated that it was not clear from the evidence how many of the beachfront properties are in the affected area other than four identified by testimony of one witness. Accordingly, the ALJ ruled that this organization failed to meet the associational requirements to appear in the administrative proceeding.

Stop the Beach Renourishment has six members, all owners of beachfront property in the area of the proposed project.[4] The ALJ found that all six members would be affected by the project if it significantly reduced water quality, infringed on riparian rights, or proceeded without their required consent, as alleged. The ALJ ruled that this organization had standing to appear in the administrative proceeding.

In its final order, the Department adopted the ALJ's standing rulings relating to the administrative proceeding. Appellants bring only an as-applied constitutional challenge on appeal and do not seek reversal on the Department's standing rulings or any of the other rulings on the merits from the administrative proceedings.

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[4] The six members are Slade Lindsey, Lionel D. Alford, Jr., Tammy N. Alford, Janet R. Frost, Mark Styslinger, and Suzy Spence.

B. Appeal -- the Constitutional Challenge

Appellees argue that the court lacks jurisdiction, citing Florida Chapter of the Sierra Club v. Suwannee American Cement Co., Inc., 802 So. 2d 520 (Fla. 1st DCA 2001), because appellants Save Our Beaches and Stop the Beach Renourishment lack standing to bring their constitutional challenge on behalf of their individual members in this appeal. In Sierra Club, the court held that the organizational appellants did not have standing to appeal the Department's order granting a permit and dismissed the appeal. The court noted that section 120.68(1), Florida Statutes, allows judicial review of a final order only by "a party who is adversely affected." Id. at 521. The court noted that the organizations had only a generalized interest in the environment and had failed to provide evidence that their individual members would be adversely affected by the Department's order. Id. at 522-23.

For the same reasons given by the ALJ in the administrative proceeding, we agree with appellees that, as in Sierra Club, Save Our Beaches has provided no facts that its individual members will be sufficiently adversely affected to satisfy the requirements of section 120.68(1). Accordingly, we dismiss the appeal by Save Our Beaches. Id. at 523.

However, unlike the organizations in Sierra Club, all of the individual members in Stop the Beach Renourishment own property in the affected area. Competent substantial evidence for this factual finding by the ALJ is found in the unrebutted testimony of Mr. Slade Lindsey, one of the six

members. Mr. Lindsey testified that all six members owned waterfront property, up to the mean high water line, in the area of the proposed project. The ALJ found that all six members would be affected by the project if it significantly reduced water quality, infringed on riparian rights, or proceeded without their required consent, as alleged.

We reject appellees' argument that associations cannot bring constitutional challenges. See Pennell v. City of San Jose, 485 U.S. 1 (1988) (holding that an unincorporated association organized for the purpose of representing the interests of owners and lessors of real property had standing to assert that the application of the city rent control ordinance violated the Fifth and Fourteenth Amendments' prohibition against taking of private property for public use without just compensation); Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 342-45 (1977) (holding that the Commission had standing to challenge the constitutionality of a North Carolina statute; "[i]f the Commission were a voluntary membership organization-a typical trade association-its standing to bring this action as the representative of its constituents would be clear under prior decisions of this Court," collecting cases). The only cases cited by appellees in support of their argument on this issue do not involve associations. See e.g., Sieniarecki v. State, 756 So. 2d 68, 76 (Fla. 2000) (holding that a daughter being prosecuted for neglect of a disabled person, arising from the death of her mother, had no vicarious right to assert her mother's Florida constitutional right of privacy to refuse medical treatment).

Accordingly, we hold that Stop the Beach Renourishment ("STBR") has satisfied the requirements of section 120.68(1) and we have jurisdiction because it has standing to bring this appeal.

III. RIPARIAN RIGHTS

STBR argues that the final order unconstitutionally applies the Beach and Shore Preservation Act, by taking private property without compensation. This claim is properly before us for determination. See Key Haven Associated Enters., Inc. v. Bd. of Trs. of the Internal Improvement Trust Fund, 427 So. 2d 153, 158 (Fla. 1982) (ruling that the district court, sitting in its review capacity, is "a proper forum to resolve this type of constitutional challenge [unconstitutional application of a statute or agency rule] because those courts have the power to declare the agency action improper and to require any modifications in the administrative decision-making process necessary to render the final agency order constitutional").

Riparian rights are property rights that cannot be constitutionally taken without just compensation. See Bd. of Trs. of the Internal Improvement Trust Fund v. Sand Key Assocs., Ltd., 512 So. 2d 934, 936 (Fla. 1987) (noting that "[t]he term 'riparian owner' applies to waterfront owners along a river or stream, and 'littoral owner' applies to waterfront owners abutting an ocean, sea, or lake. Cases and statutes, however, have used 'riparian owner' broadly to describe all waterfront owners;" the Court has "held that riparian or littoral rights are legal rights and, for constitutional purposes, the

common law rights of riparian and littoral owners constitute property"); Thiesen v. Gulf, F. & A. Ry. Co., 78 So. 491, 506 (Fla. 1918) (ruling that the act at issue, purporting to grant the submerged land between the high and low water marks lying in front of the land of a riparian owner to a railroad company, "undertakes to deprive without compensation the owner of lots, the boundaries of which extend to high-water mark of the bay, lying within the area covered by the map of the water front referred to in the act, of their rights under the common law as riparian owners. We have said that the rights of a riparian owner at common law constituted property of which he could not be deprived without just compensation."); Lee County v. Kiesel, 705 So. 2d 1013, 1015 (Fla. 2d DCA 1998); Kendry v. State Road Dep't, 213 So. 2d 23, 28 (Fla. 4th DCA 1968).

"Riparian and littoral property rights consist not only of the right to use the water shared by the public, but include the following vested rights: (1) the right of access to the water, including the right to have the property's contact with the water remain intact[5]; (2) the right to use the water for navigational purposes; (3) the right to an unobstructed view of the

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[5] See also Bd. of Trs. of the Internal Improvement Trust Fund v. Medeira Beach Nominee, Inc., 272 So. 2d 209, 214 (Fla. 2d DCA 1973) (recognizing that riparian owners "have the exclusive right of access over their own property to the water").

water; and (4) the right to receive accretions[6] and relictions to the property." Sand Key Assocs., 512 So. 2d at 936.

Section 253.141(1), Florida Statutes (2005) describes riparian rights:

> (1) Riparian rights are those incident to land bordering upon navigable waters. They are rights of ingress, egress, boating, bathing, and fishing and such others as may be or have been defined by law. Such rights are not of a proprietary nature. They are rights inuring to the owner of the riparian land but are not owned by him or her. They are appurtenant to and are inseparable from the riparian land. The land to which the owner holds title must extend to the ordinary high watermark of the navigable water in order that riparian rights may attach. Conveyance of title to or lease of the riparian land entitles the grantee to the riparian

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[6] In Sand Key Associates, the Court rejected the state's argument that it owned all accretions caused by the construction of a jetty on oceanfront property on Sand Key in Pinellas County, Florida, because it was artificially created by the state. 512 So. 2d at 937-38. The Court also noted that "the common law has never allowed a waterfront owner to receive title to artificially created accretions when he caused those additions to his land by improvements. In this circumstance, title to the accreted land remains with the sovereign." Id. at 938.

> rights running therewith whether or not mentioned in the deed or lease of the upland.

(Emphasis added). Whatever differences may exist between this statute and common law, they do not affect the analysis of the issues in the case before us. See Theresa Bixler Proctor, Erosion of Riparian Rights Along Florida's Coast, 20 Fla. St. U. J. Land Use & Envtl. L. 117, 131-35 (2004) (describing the history of this statute and noting that differences between the statute and common law have yet to be determined). The express language of the statute stating "and such others [riparian rights] as may be or have been defined by law," indicates that the statute does not completely replace the common law. Moreover, the legislature explicitly recognizes in section 161.201 that common law riparian rights continue to exist. See § 161.201, Fla. Stat. (2005) (providing that upland owners "continue to be entitled to all common-law riparian rights except as otherwise provided in s. 161.191(2) [eliminating right of accretion] . . . .") (emphasis added).

As described below, we agree with STBR's argument that its members' riparian rights to (i) receive accretions and relictions to the property, and (ii) have the property's contact with the water remain intact, were eliminated by the Department's final order. Because their riparian rights were unconstitutionally taken without an eminent domain proceeding as required by section 161.141, those rights have been infringed upon. Because those riparian rights have been infringed, contrary to the Department's ruling, satisfactory evidence of

sufficient upland interest required by rule 18-21.004(3) must be provided.

A. The Boundary

Florida law provides that "a riparian or littoral owner owns to the line of the ordinary high water mark on navigable waters." Sand Key Associates, Ltd., 512 So. 2d at 936. See also Bd. of Trs. of the Internal Improvement Trust Fund v. Medeira Beach Nominee, Inc., 272 So. 2d 209, 213 (Fla. 2d DCA 1973) (stating that "[t]he ordinary high water mark is well established as the dividing line between private riparian and sovereign or public ownership of the land beneath the water"); Art. X, § 11, Fla. Const. ("**Sovereignty lands**. -- The title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people. . . .") (emphasis added); Teat v. City of Apalachicola, 738 So. 2d 413, 414 (Fla. 1st DCA 1999) (stating that "[c]urrently, the State's ownership extends up to the ordinary high water mark of navigable waterways, and an individual must own property down to the ordinary high water mark in order to possess riparian rights," citing Florida Statutes including section 253.141).

The Florida Coastal Mapping Act of 1974 contains uniform standards and procedures relating to the coastal boundaries:

> The Legislature recognizes the desirability of confirmation of the mean high-water line, as recognized in the

> State Constitution and defined in s. 177.27(15) as the boundary between state sovereignty land and uplands subject to private ownership, as well as the necessity for uniform standards and procedures with respect to the establishment of local tidal datums and the determination of the mean high-water and mean low-water lines, and therefore directs that uniform standards and procedures be developed.

§ 177.26, Fla. Stat. (2005). See § 177.27(15), Fla. Stat. (2005) ("'Mean high-water line' means the intersection of the tidal plane of mean high water with the shore"); § 177.27(14), Fla. Stat. (2005) (" 'Mean high water' means the average height of the high waters over a 19-year period. For shorter periods of observation, 'mean high water' means the average height of the high waters after corrections are applied to eliminate known variations and to reduce the result to the equivalent of a mean 19-year value.").

The court in Medeira Beach described why the use of the high water mark as a boundary is important:

> The use of this dividing line has been reaffirmed in Hughes v. Washington, 389 U.S. 290, 88 S. Ct. 438, 19 L.Ed.2d 530 (1967), where the court reaffirmed the *Lovingston* accretion doctrine in a contest between the state and a private riparian. There the court said:

> "Any other rule would leave riparian owners continually in danger of losing access to water which is often the most valuable feature of their property, and continually vulnerable to harassing litigation challenging the location of the original water lines." *Id.* at 293-294, 88 S.Ct. at 440-441.
>
> It is apparent that the reasoning behind this line is demonstrated in the day to day utilization of the waterfront property by its riparian owner. Although the mean or high water mark is an average over a number of years, the daily mark of a high tide on the shore gives both the riparian and the public notice of their possible use of the land on either side of the mark. Freezing the boundary at a point in time, such as was done in *Martin* or as is suggested here by the state, not only does damage to all the considerations above but renders the ordinary high water mark useless as a boundary line clearly marking the riparian's rights and the sovereign's rights.

Medeira Beach, 272 So. 2d at 213 (emphasis added).

The erosion control line was established by the Board of Trustees on the high water mark. That

became the fixed new boundary of the property. *See* § 161.191(1), Fla. Stat. (2005) (stating in relevant part that "[u]pon the filing of a copy of the board of trustees' resolution and recording of the survey showing the location of the erosion control line . . . title to all lands seaward of the erosion control line shall be deemed to be vested in the state by right of its sovereignty, and title to all lands landward of such line shall be vested in the riparian upland owners"). As in *Medeira Beach*, the freezing of the erosion control line renders the ordinary high water mark useless as a boundary line, which is contrary to the property owners' boundaries. Although STBR's members' deeds are not in the record, there is unrebutted testimony that their property boundaries extend to the high water mark.

B. Deprivation of Riparian Rights

The parties agree that this project will cause the high water mark to move seaward and ordinarily this would result in the upland landowners gaining property by accretion. However, section 161.191(2) states that "the common law shall no longer operate to increase or decrease the proportions of any upland property lying landward of such line, either by accretion or erosion . . . ." Therefore, the Department's final order, approving the permits and authorization for the project, will deprive STBR's members of their riparian accretion rights.

Moreover, because the boundary will now remain fixed, as the high water mark moves seaward, the landowners will also lose the right to have the property's contact with the water remain intact. It is not enough to provide, as in section

161.201, rights of ingress and egress to the water over the state's land.

These deprivations of riparian rights are an unconstitutional taking of STBR's members' riparian rights. The Department relied on section 161.201 to rule that the landowners' riparian rights are not affected by its final order. Although section 161.201 has language describing a preservation of common law riparian rights, it does not actually operate to preserve the rights at issue in this case. Florida's law is clear that riparian rights cannot be severed from riparian uplands absent an agreement with the riparian owner, not even by the power of eminent domain. See, Belvedere Dev. Corp. v. Dep't. of Transp., 476 So. 2d 649 (Fla. 1985) (holding that a property was taken without an award for damages in violation of the Florida Constitution when the Department sought to acquire the property in fee simple absolute with an express reservation to the landowners of the rights to use and enjoy the riparian rights of and pertaining to the land).

Belvedere controls by explicitly holding that the riparian rights cannot be constitutionally reserved to the landowners as described in section 161.201. Id. at 652 (ruling that "in the context of condemnation of property, we think the condemnor should be unable to reserve the riparian rights to the condemnee in the absence of an express bilateral agreement to do so with the condemnee;" and concluding that "the act of condemning petitioners' lands without compensating them for their riparian property rights under these facts was an unconstitutional taking"). See also § 253.141(1), Fla.

Stat. (2005) (stating that riparian rights "are inseparable from the riparian land"). Therefore, the statutory "reservation" of STBR's members' riparian rights is legally invalid with the effect that as applied in this case, the Beach and Shore Preservation Act deprives the members of their constitutionally protected riparian rights without just compensation for the property taken. Because those riparian rights have been infringed, contrary to the Department's ruling, satisfactory evidence of sufficient upland interest required by rule 18-21.004(3) must be provided.

Conclusion

Accordingly, we reverse the Department's final order approving the Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands. We remand for the Department to provide satisfactory evidence of sufficient upland interest pursuant to Florida Administrative Code Rule 18-21.004(3)(b). As provided by section 161.141, Florida Statutes (2005), if the project "cannot reasonably be accomplished without the taking of private property, the taking must be made by the requesting authority by eminent domain proceedings."[7] To the extent that the Board of Trustees recorded a resolution and survey in the public records showing a boundary of STBR's members' property that is different from

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[7] We do not address whether an eminent domain proceeding will be required or what property would be subject to the proceeding. Those issues are not before us in this case.

their deeds, the resolution and survey are declared invalid as to the members' property boundaries.

REVERSED and REMANDED with directions. (KAHN, C.J. and LEWIS, J., CONCUR.)

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

SAVE OUR BEACHES, INC. & STOP THE BEACH RENOURISHMENT, INC.,

Petitioners,

v.

Final Order No. DEP:0509781

DOAH Case No. 04-2960

STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE CITY OF DESTIN. and WALTON COUNTY.

Respondents.
_____/

STOP THE BEACH RENOURISHMENT, INC.,

Petitioner,

v.

DOAH Case No. 04-3261

DEP CASE No. 04-1370

STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE CITY OF DESTIN, and WALTON COUNTY,

Respondents.

FINAL ORDER

On June 30, 2005, an Administrative Law Judge with the Division of Administrative Hearings ('DOAH') submitted his Recommended Order ("RO") to the Florida Department of Environmental Protection (DEP) in this administrative proceeding, Copies of the RO were served upon counsel for the Petitioners, Save Our Beaches, Inc. ("SOB") and Stop the Beach Renourishment, Inc. ("STBR") and for the Co-Respondents, City of Destin ("City") and Walton County ("County"). A copy of the RO is attached hereto as Exhibit A. Exceptions to the RO were filed on behalf of Petitioners SOB and STBR on July 15, 2005. The City and County filed a timely joint Response to Petitioners' Exceptions on July 18, and DEP filed its Response to Petitioners' Exceptions on July 21, 2005. The matter is now before the Secretary of DEP for final agency action.

BACKGROUND

The Gulf of Mexico beaches of the City and County were critically eroded by Hurricane Opal in 1995. The erosion problem was identified by DEP, which placed these beaches on its list of critically-eroded beaches. The City and County then initiated a lengthy process of beach restoration through renourishment (also called maintenance nourishment.) The process, which included extensive studies and construction design and pre-application conferences with DEP staff, culminated in the filing of an Application for a Joint Coastal Permit and

Authorization to Use Sovereign Submerged Lands on July 30, 2003 (the "Application").

The Application proposed to dredge sand from an ebb shoal borrow area south of East Pass in eastern Okaloosa County, using either a cutter head dredge (which disturbs the sand on the bottom of the borrow area and vacuums it into a pipeline which delivers it to the project area) or a hopper dredge (which fills itself and is moved to the project site). On the project site, heavy equipment moves the dredged sand as specified in the design plans. The project is executed in this manner and progresses along the beach, usually at a pace of about 300-500 feet a day. Each day work is in progress, public access to the beach is restricted for a length of about 50-1000 feet in the immediate vicinity of the area of beach being worked. After requests for additional information and responses to those requests, DEP issued a Notice of Intent to Issue the permit, DEP JCP File No. 0218419-001-JC Draft Permit) on or about July 15, 2004. Save Our Beaches, Inc. (SOB) and Stop the Beach Renourishment, Inc. (STBR) timely filed a Petition for Formal Administrative Hearing challenging issuance of the Draft Permit. STBR also filed a Petition for Formal Administrative Hearing challenging the County Erosion Control Line (ECL) established by the Board of Trustees of the Internal Improvement Trust Fund (BOT), in conjunction with the proposed beach restoration project. The two cases were consolidated, and a final administrative hearing was held on June 7, 2005 in Sandestin, Florid4 before J. Lawrence Johnston, Administrative Law Judge (ALJ), Division of Administrative Hearings. The ALJ ultimately

recommended that DEP enter a final order issuing the Joint Coastal Permit.

RULINGS ON EXCEPTIONS OF PETITIONERS

Exception 1

The.Petitioners' first Exception objects to the ALJ's Conclusions of Law 41-43, in which he concluded that the City and County were not required to provide "satisfactory evidence of sufficient upland interest" because they met the exception to that requirement in Rule 18-21.004(3)(b), F.A.C. That rule states, in pertinent part:

> Satisfactory evidence of sufficient upland interest is required for activities on sovereignty submerged lands riparian to uplands, unless otherwise specified in this chapter. Satisfactory evidence of sufficient upland interest is not required for activities on sovereignty submerged lands that are not riparian to uplands, or when a governmental entity conducts restoration and enhancement activities, provided that such activities do not unreasonably infringe on riparian rights.

The term "riparian rights" is defined by Rule 18-21.004(3)(a), F.A.C., as those set forth in Section 253.141, Florida Statutes, which provides, in pertinent part, that "riparian rights are those

incident to land bordering upon navigable waters. They are rights of ingress and egress, boating, bathing, and fishing, and such others as may be or have been defined by law."

The Petitioners concede that, because the City and County are governmental entities conducting restoration and enhancement activities, they are not required to provide satisfactory evidence of sufficient upland interest, unless the proposed activities "unreasonably infringe on riparian rights." The Petitioners argue, however, that the proposed project will eliminate two separate riparian rights -- the 'right to accretion" and the "right to have the property's contact with the water remain intact."

The Florida Legislature has declared that it is the public policy of this state to properly manage and protect Florida beaches from erosion, and that beach restoration and nourishment projects are in the public interest. See Section 403,161.088, F.S. The Legislature has also set out a process for the approval of such projects in Sections 161.141 - 161.211,F.S. Before any construction permit can be issued, an erosion control line ('ECL) must be established and approved by the Board of Trustees of the Internal Improvement Trust Fund ("Trustees").

Once the ECL is established, Section 161.191(1), F.S., provides that "title to all lands seaward of the erosion control line shall be deemed to be vested in the state by right of its sovereignty, and title to all lands landward of such line shall be vested in the riparian upland owners." Subsection (2) of this same section goes on to provide that "the

common law shall no longer operate to increase or decrease the proportions of any upland property lying landward of such line, either by accretion or erosion or by any other natural or artificial process." Finally, Section 161.201, F.S., provides that "[a]ny upland owner or lessee who by operation of ss. 161.141-161.211 ceases to be a holder of title to the mean high-water line shall, nonetheless, continue to be entitled to all common-law riparian rights except as otherwise provided in s. 161.191(2) including but not limited to rights of ingress, egress, view, boating, bathing, and fishing."

In *Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Associates. Ltd.*, 512 5o.2.d,934 (Fla- 1987), the Florida Supreme Court described several common law riparian rights, including the right to accretion and the "right of access to the water, including the right to have the property's contact with the water remain intact," *Id.* At 936, Section 161.191(2), F.S., specifically eliminates the common law right to accretion in beach restoration and nourishment projects. The ALJ correctly concluded that the right of riparian land to touch the water is no different than the right to future accretion, and so was not a separate and distinct riparian right. Whether or not correct under the common law, it is certainly the case under. Sections 161.141-161.211, F.S. that the right to future accretion and the right of riparian land to touch the water have both been statutorily eliminated by act of the Legislature. When a new sandy beach is created by a restoration and nourishment project seaward of the ECL, title to that new land is vested in the state. Thus, any

purported prior common law right of a riparian owner to take title to this new land and to retain ownership of the property to the water's edge has been expressly eliminated by the Florida Legislature.

It is the establishment of the ECL and the process set forth in Sections 161.141-161.211, F.S., which might arguably be asserted as infringing on the common law rights of riparian owners. The issuance of the Joint Coastal Permit in accordance with the applicable statutes and implementing rules will not infringe on these riparian rights. The Petitioners do not even address the requirement that any infringement of riparian rights must be "unreasonable" in order to trigger the necessity of showing a sufficient upland interest. Instead, the Petitioners apparently suggest that, if their riparian rights are eliminated or otherwise infringed on, such infringement must per se be unreasonable, even if such infringement is expressly authorized by statute.

The ALJ specifically found that there would be no infringement of riparian rights resulting from the draft permit, but that even if any infringement did result from the issuance of the permit, such infringement was "not unreasonable." The Petitioners have failed to show that this critical finding of the ALJ is flawed or not based on competent substantial evidence. For these reasons, the conclusions of the ALJ are upheld, and the Petitioners' Exception 1 is denied.

Exception 2

In their second Exception, the Petitioners object to the ALJ's Conclusions of Law 45-47, in which he concluded drat the City and County were proper applicants for the Joint Coastal Permit. The Petitioners argue that Rule 628-41.005(3), F.A.C., allows the Department to issue a coastal construction permit only "upon receipt of an application from a property or riparian owner and upon consideration of the facts or circumstances." The Petitioners further argue that, since neither the City nor the County are the riparian owner of all of the property encompassed within the project area, they could not be entitled to the Joint Coastal Permit. As the ALJ correctly concluded, this argument fails for two reasons.

Chapter 62B-41, F.A.C., originally applied to coastal construction permits before they were combined with wetland/ environmental resource permits to become Joint Coastal Permits. Rule 628-41.002(3) defines an applicant for a coastal construction permit as "any person, firm, corporation, county, municipality, township, special district, or any public agency, or their agent having authority ... to request a permit to conduct any coastal construction activities upon sovereignty lands of Florid4 below the mean high-water line of any tidal water of the State." This language implements Section 161.041(l), F.S., which provides that a coastal construction permit is required if "any person, firm, corporation, county, municipality, township, special district, or any public agency" undertakes any construction for shore protection

purposes, including artificial nourishment below the mean high water line of any tidal waters.

Chapter 62B-49, F.A.C., implements Section 161.055, F.S., and applies when both a coastal construction permit and an environmental resource permit are required. Rule 62B-49.002(3), F.A.C., similarly defines an applicant for Joint Coastal Permit as "any person, firm, corporation, county, municipality, township, special district, or any public agency having authority ... to request a permit, and if necessary, an authorization to conduct activities upon sovereign submerged lands of Florida.

Rule 628-49.001, F.A.C., describes the scope of the Joint Coastal Permit rule, and provides:

> This chapter implements the provisions of 161.055, Florida Statutes, establishing a joint coastal permit. A joint coastal permit is issued when both a coastal construction permit is required pursuant to Section 161.041, Florida Statutes, and an environmental resource permit pursuant to Part [V of Chapter 373, Florida Statutes, are required. This chapter also provides for concurrent review of any activity requiring a joint coastal permit that also requires a proprietary authorization for use of sovereign submerged lands owned by the Board of Trustees of the Internal Improvement Trust Fund. In the event there is a conflict between the

> procedural requirements of this chapter and other procedural rules promulgated pursuant to the referenced statutes, then this chapter shall govern. The standards and criteria for issuance of environmental resource permits and coastal construction permits pursuant to Tide 62, Florida Administrative Code, and proprietary authorizations pursuant to Chapters 18- 18, 18-20, 18-21, Florida Administrative Code, shall be applicable to the review of joint coastal permits. [Emphasis added.]

In the instant case, both the City (a municipality) and the County (a county) desire to deposit beach material on sovereignty lands of the State of Florida below the mean high water line for the purpose of shore protection and beach restoration pursuant to Sections 161.088-161.212, F.S. All of the cited rules and statutes clearly anticipate that cities and counties will be proper applicants for both coastal construction permits and joint coastal permits. Whether or not Rule 628-41.005(3), F.A.C., should be read to require a local government to be a riparian owner of upland property, it is clearly a procedural requirement not applicable under Chapter 628-49, F.A.C. This riparian owner of upland property issue is not one of the "standards and criteria for issuance of environmental resource permits and coastal construction permits" that are expressly made applicable to joint coastal permits. If the rule language was applied as Petitioners urge, it would effectively subvert the Legislatively-expressed

public policy of beach nourishment by requiring a local government to be the riparian owner of all the upland property impacted by the project. I reject the Petitioners' suggestion that the City and County could get around the alleged ownership requirement by obtaining the written consent from the owners of other property as having no basis in the applicable rules or statutes.

The evidence in the record demonstrates that DEP does not interpret its rules to require a county or city government to be the riparian or upland owner of all the property encompassed in the project, and considers the requirement in Rule 628-41.005(3), F.A.C., to be inapplicable to joint coastal permit applications. The Department's interpretation of the rules and statutes it is charged with administering is entitled to considerable deference. *Level 3 Communications. LLC v. Jacobs*, 841 So. 2d.447 (Fla. 2003); *Meszaros v. Dep't of Agriculture and Consumer Services*, 861 So. 2d 86 (Fla" 5th DCA 2003). Furthermore, these agency interpretations of statutes and rules within their regulatory jurisdiction should not be overturned unless they are "clearly erroneous." *Dept. of Environmental Regulation v, Goldring*, 477 So. 2d 532,534 (Fla. 1985).

The ALJ also concluded that, even if Rule 61B-41.004(3), F.A.C., were applicable, it merely provides that DEP will determine whether to authorize activity "upon receipt of an application from a property or riparian owner." Since the ALI found that both the City and County own upland riparian

property within the Project area, they would appear to satisfy this generic requirement.

For these reasons, the conclusions of the ALJ are upheld, and Petitioners' Exception 2 is denied.

It is therefore ORDERED:

A. The Recommended Order is adopted in its entirety and is incorporated by reference herein.

B. The Department shall forthwith ISSUE permit JCP File No. 0218419-001-JC to the City of Destin and Walton County.

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of the Department.

DONE AND ORDERED this 27th day of July, 2005, in Tallahassee, Florida.

STATE OF FLORIDA
DEPARTMENT OF
ENVIRONMENTAL
PROTECTION

COLLEEN M. CASTILLE, Secretary
Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SAVE OUR BEACHES, INC., and
STOP THE BEACH RENOURISHMENT,
INC.,

Petitioners,

vs.

DEPARTMENT OF ENVIRONMENTAL
PROTECTION, CITY OF DESTIN,
and WALTON COUNTY,

Respondents.

Case No. 04-2960

STOP THE BEACH RENOURISHMENT,
INC.,

Petitioner,

vs.

DEPARTMENT OF ENVIRONMENTAL
PROTECTION and BOARD OF
TRUSTEES OF THE INTERNAL
IMPROVEMENT TRUST FUND,

Respondents.

Case No. 04-3261

RECOMMENDED ORDER

On June 7, 2005, a final administrative hearing was held in this case in Sandestin, Florida, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether the Department of Environmental Protection (DEP) should grant the application of the City of Destin (City) and Walton County (County) for a Consolidated Joint Coastal Permit (JCP) and Sovereign Submerged Lands Authorization (Application) to restore a 6.9 stretch of beach in the City and County.

PRELIMINARY STATEMENT

After conducting an extensive studies and pre-application conferences with DEP staff, the City and County filed their Application on July 30, 2003. After requests for additional information and responses to those requests, DEP issued a Notice of Intent to Issue Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands, DEP JCP File No. 0218419-001-JC (Draft Permit) on or about July 15, 2004.

Save Our Beaches, Inc. (SOB) and Stop the Beach Renourishment, Inc. (STBR) filed a Petition for Formal Administrative Hearing challenging issuance of the Draft Permit, which was given DEP OGC Case No. 04-1370, referred to the Division of Administrative Hearings (DOAH) on August 20, 2004, and given DOAH Case No. 04-2960. STBR also filed a Petition for Formal Administrative Hearing challenging the County Erosion Control Line (ECL) established by the Board of Trustees of the Internal Improvement Trust Fund (BOT), in conjunction with the proposed beach restoration project, which was

given DEP OGC Case No. 04-1545, referred to DOAH on August 15, 2004, and given DOAH Case No. 04-3261. The two cases were consolidated and set for final hearing in Sandestin beginning February 7, 2005.

In December 2004, without objection, SOB and STBR filed a joint Amended Petition challenging both the Draft Permit and the ECLs established by the BOT in conjunction with the proposed beach restoration projects. In January 2005, the City and County moved without opposition to dismiss constitutional property rights issues from the Amended Petition, which was granted. (SOB and STBR were pursuing their constitutional claims in an action in state circuit court to have applicable statutes declared unconstitutional.)

In February 2005, SOB and STBR moved for a continuance, which was opposed, and the City and County moved to dismiss the issue "whether the local sponsors for the Project have obtained, or are able to obtain, all of the requisite private property rights necessary to implement the Project," which also was opposed. The continuance was denied, and the motion to dismiss was withdrawn. After Petitioners filed a Pre-Hearing Statement and the other parties filed a Joint Pre-Hearing Stipulation, the City and County filed an Emergency Unopposed Motion for Continuance, which was granted, and the final hearing was rescheduled for May 10-11, 2005. The City and County then filed an Unopposed Motion for Continuance on behalf of DEP, which was granted, and the final hearing was rescheduled for June 7-8, 2005.

On June 3, 2005, the City and County filed a Joint Request for Official Recognition. At the final hearing, the request for official recognition of codified statutes and rules was granted without objection. But SOB and STBR opposed the request for official recognition of Chapter 2004-475, Laws of Florida (2004), and a related Senate Staff Analysis on grounds of relevance, and ruling was reserved. It is now ruled that those items are not relevant to the remaining issues in this case.

At the final hearing, the parties had the Application File admitted in evidence as Joint Exhibit 1. The City and County called five witnesses: Phil Flood, DEP's Beach and Coastal Systems Manager and an expert in coastal permitting; Thomas Campbell, P.E., an expert in coastal engineering; Jamie Christoff, DEP's Environmental Resource Permitting processor who reviewed the Application in this case; Brad Pickel, Director of Beach Management in the County's Tourist Development Council, which sponsored the project; and Lindy Chabot, the City's grants and project manager responsible for the proposed project. The City and County also had Respondents' Exhibits 1-3 admitted in evidence on behalf of themselves and DEP. DEP also called Marty Seeling, DEP's Administrator of Beach Protection Environmental Resource Permitting, and an expert in DEP's interpretation of beach protection statutes and rules and in beach restoration projects. SOB and STBR called two witnesses: Slade Lindsey, a beachfront property owner and a representative of STBR; and Linda Cherry, a beachfront property owner and a

representative of SOB. SOB and STBR also had Petitioners' Exhibits 1-7 admitted in evidence.

After presentation of evidence, the City and County requested a transcript of the final hearing, and the parties were given ten days from the filing of the transcript in which to file proposed recommended orders (PROs). The Transcript was filed June 14, 2005, making PROs due June 24, 2005. PROs were timely-filed and have been considered.

FINDINGS OF FACT

1. The Gulf of Mexico beaches of the County and City were critically eroded by Hurricane Opal in 1995. The erosion problem was identified by DEP, which placed the beaches on its list of critically-eroded beaches, and by the County and City, which initiated a lengthy process of beach restoration through renourishment (also called maintenance nourishment.)1 The process, which included an extensive studies2 and construction design, as well as pre-application conferences with DEP staff, culminated in the filing of the Application on July 30, 2003.

2. The Application proposed to dredge sand from an ebb shoal (i.e., a near-shore) borrow area south of (i.e., offshore from) East Pass in eastern Okaloosa County, using either a cutter head dredge (which disturbs the sand on the bottom of the borrow area and vacuums it into a pipeline which delivers it to the project area) or a hopper dredge (which fills itself and is moved to the project site).

On the project site, heavy equipment moves the dredged sand as specified in the design plans. The project is executed in this manner and progresses along the beach, usually at a pace of about 300-500 feet a day. Each day work is in progress, public access to the beach is restricted for a length of about 500-1000 feet in the immediate vicinity of the area of beach being worked.

A. Water Quality

3. Increased turbidity is the primary water quality concern in a project of this nature. Increased turbidity can adversely impact submerged seagrasses and hard-bottom habitat, along with the benthic communities depending on them. When sand in the borrow area is disturbed by dredging, sand and silt become suspended and increase turbidity to some extent and for some duration, depending primarily on the nature of the bottom material and the dredging method. (The cutter head dredge vacuums most if not all of the disturbed sand and silt into the pipeline while, by comparison, the hopper dredge would result in higher turbidity in the water in the borrow area.) Sand delivered to the project site via pipeline must remain suspended in water for transport. When the sand is deposited on the beach, the excess water, with suspended particulate matter, will drain off and return to the Gulf of Mexico. Even if hopper dredges are used, and if material is deposited on the project site other than via pipeline, some of the material will be deposited in the littoral zone, and some material deposited landward of the waterline will be inundated by the tides and wave action and potentially re-suspended

in water in the littoral zone. If the water is turbid upon discharge in the littoral zone, the near-shore can become more turbid.

(i) Sand Quality

4. The primary determinant of the amount and duration of turbidity generated in the borrow area and in the littoral zone of the project site is the quality of the bottom material in the chosen borrow area. The coarser the material, the less turbidity. The best quality bottom material usually is found in the kind of borrow area proposed for use in the Application. Sand in the borrow area came from some of Florida's finest beaches. It has been cleaned of fine material (silt) not only by wave action but also as the sand moved along shore in the littoral zone and by the currents in the East Pass inlet.

5. Numerous tests of the bottom material in the proposed ebb shoal borrow for the project indicates that it generally has less than one percent silt. Expert witnesses for the City, County, and DEP testified that, with such low silt content, turbidity increases of no more than 5-10 Nephalometric Turbidity Units (NTUs) above background levels are expected at the edge of the mixing zone - 150 meters downcurrent from the borrow area, and down-current and offshore from the discharge points on the beach. Moreover, they testified that turbidity levels are expected to return to background levels quickly (*i.e.*, within an hour or so.)

6. SOB and STBR questioned whether the experts could be certain of their testimony based on

the test results. But SOB and STBR called no expert to contradict the testimony, and it is found that the expert testimony was persuasive.

(ii) Standard Mixing Zone

7. Initially, the City and County applied for a variance from the turbidity standards to allow them to exceed 29 NTUs more than 150 but less than 1660 meters down-current from the borrow area, and down-current and offshore from the discharge points, based on Attachment H, the Water Quality Impact analysis in the Application. The analysis was based on an assumption of five percent silt content in the bottom material in the borrow area. SOB and STBR attempted to use the five percent assumption to impeach the expert testimony on water quality. But when the quality of the bottom material was ascertained to be less than one percent, the variance request was withdrawn at DEP's request as being unnecessary and therefore inappropriate.

8. SOB and STBR also argued in their PRO that, if a 1660-meter mixing zone was needed for five percent fines, then a 332-meter mixing zone would be needed for one percent fines. This argument was based entirely on counsel's arithmetic extrapolation. There was no evidence in the record from which to ascertain the validity of the extrapolation. In addition, the evidence was that the bottom material in the borrow area in this case will be less than one percent fines.

(iii) Shore-Parallel Sand Dike

9. Specific Condition 6 of the Draft Permit requires the permittee to "construct and maintain a shore-parallel sand dike at the beach placement area at all times during hydraulic discharge on the beach to meet turbidity standards prescribed by this permit." The shore-parallel sand dike is essentially a wall of sand built parallel to the shoreline to keep the sand slurry (the mixture of sand and water) being pumped onto the beach from washing back in the water, thereby giving the materials more time to settle out of the water before the water returns to the Gulf of Mexico. Even if this condition were not in the Draft Permit, the City and County would be required to build the dike since it is part of their design for construction of the Project.

(iv) Turbidity Monitoring

10. The Application included a proposal to monitor turbidity, and the Draft Permit includes the proposed monitoring as a Specific Condition 38. Every six hours during dredging and pumping operations, the City and County are required to sample 150 meters down-current of the borrow area, and down-current and offshore of the discharge point, and report the results to DEP within a week. In addition, Specific Condition 38 requires work to stop if turbidity standards are exceeded, which must be reported immediately. Work may not proceed "until corrective measures have been taken and turbidity has returned to acceptable levels." If more than one exceedence of the turbidity standard is reported, DEP will require the City and County to redesign the project to address and cure the problem.

These conditions are part of the reasonable assurance that water quality standards will not be violated.

(v) Sediment Quality Control/Quality Assurance Plan

11. Pursuant to Special Condition 4.b. of the Draft Permit, the City and County are required to do a Sediment Quality Control/Quality Assurance Plan, which requires them to measure the quality of the sand as it comes out of the pipeline before it can cause a turbidity problem. If the dredge hits pockets of bad material, which is not expected in this case, work could be stopped before it creates a turbidity problem.

(vi) Absence of Natural Resources in Project Area

12. DEP performed side-scan sonar tests in the vicinity of both the borrow site and near-shore in the Project area and determined that there were no hard bottoms or seagrasses in either area. Therefore, there are no natural resources within the project area that would be covered or placed in jeopardy by a turbidity plume.

(vii) Reasonable Assurance Given

13. For all of these reasons, the City and County have provided reasonable assurance that water quality standards will not be violated.

B. Required Riparian Interest

14. Generally, and in the beach nourishment project area, the BOT owns seaward of the mean high water line (MHWL). The City and County own some but not all of the beachfront landward of the MHWL.3

15. In anticipation of the beach nourishment project, the City and County had the MHWL surveyed as of September 7, 2003.4. The surveys state that the MHWL as of that date shall also be known as the ECL.

16. The surveys also depict the landward and seaward limits of construction and the predicted post-construction MHWL. The surveys indicate that construction is planned to take place both landward and seaward of the ECL. The predicted post-construction MHWL is seaward of the ECL.

17. By resolution, the BOT approved the surveys and established the ECLs for the Project. The City survey was approved, and ECL established, on December 30, 2004; the County survey was approved, and ECL established, on January 25, 2005. The BOT's decisions are being challenged in court. If the decisions are upheld, the BOT intends to file its resolutions and record the surveys.

18. There was no evidence that the City and County have an easement or the consent of all of the other beachfront owners to undertake the proposed beach nourishment project. Some of the other beachfront owners do not consent, including members of SOB and STBR.

C. Standing

19. SOB was incorporated not-for-profit in Florida on January 28, 2004. STBR was incorporated not-for-profit in Florida on February 16, 2004. Both were incorporated to protect and defend the natural resources of the beaches, protect private property rights, and seek redress of past, resent, and future unauthorized and/or inappropriate beach restoration activities.

20. No evidence was presented by any party as to whether SOB and STBR have filed their annual reports with the Department of State, and no party filed a Department of State certificate of status as to either SOB or STBR.

21. STBR has six members, all owners of beachfront property in the area of the proposed beach nourishment project.5

22. SOB has approximately 150 members. These members own approximately 112 properties in the City, approximately 62 of which are beachfront and the rest condominium units of beachfront condominium developments. However, it is not clear from the evidence how many of these beachfront properties are in the area of the proposed beach nourishment project (beyond the four owned by Linda Cherry, who testified).

23. The testimony of Slade Lindsey was sufficient, together with member affidavits, to prove that all six members of STBR use the beaches and waters of the Gulf of Mexico adjacent to the Project

area for swimming, fishing, boating, and/or enjoying beach and Gulf vistas. As a result, the construction of the Project will affect their interests at least during the time construction is taking place near their property. If the Project were to result in violations of water quality standards for turbidity, their interests would be affected as long as the violations lasted and perhaps longer if lasting damage to natural resources were to result. However, as found, there will not be any lasting damage to natural resources, and reasonable assurance was given that no water quality violations will occur and that exceedences of water quality standards in the mixing zone will be of short duration, lasting for no longer than an hour. These effects will not be substantial.

24. The evidence was not sufficient to prove that construction of the Project will affect the interests of a substantial number of the members of SOB. First, it was not clear how many of them own beachfront property or even condominium units in developments adjacent to the Project area. Second, the only witness on the subject, Linda Cherry, does not know all of SOB's members and did not state how many of the 39 SOB members who signed affidavits as to their use of the beaches and waters of the Gulf of Mexico adjacent to the Project area are known to the witness. Even if a substantial number would be affected, their interests would be affected no more than the STBR members' interests.

CONCLUSIONS OF LAW

25. SOB and STBR have deferred for determination in court proceedings the constitutional property rights issues initially raised in their challenges to the DEP's Notice of Intent to Issue Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands for the beach restoration project proposed by the City and County and to establishment of the related ECL. The only remaining issues are whether the City and County gave reasonable assurance that applicable water quality standards will not be violated and whether the City and County have obtained, or are able to obtain, all requisite private property rights necessary to implement the proposed Project. In addition, the City, County, and DEP question the standing of SOB and STBR to raise these issues.

D. Standing

26. In their PRO, the City and County cite Sections 617.1622(8) and 617.0128, Florida Statutes, in support of their argument that SOB and STBR have no standing because they did not introduce in evidence a certificate of status showing that they are in good standing. The former statute provides that a corporation failing to file an annual report "may not maintain or defend any action in any court of this state until such report is filed and all fees and taxes due under this act are paid . . . ." (Emphasis supplied.) But DOAH is not a court. See Florida Dept. of Revenue v. WHI Ltd. Partnership, 754 So. 2d 205 (Fla. 1st DCA 2000). The latter statute provides in pertinent part: "(1) Anyone may apply to the Department of State to furnish a certificate of status . . . ." (Emphasis supplied.) Lack of corporate

standing under these statutes would be in the nature of an affirmative defense that the City and County would have to plead and prove. See Christie v. Highland Waterfront Co., 114 Fla. 263, 271, 153 So. 784, 787 (1934); Babe, Inc. v. Baby's Formula Service, Inc., 165 So. 2d 795, 799 (Fla. 3d DCA 1964). In this case, the City and County neither pled the defense nor introduced a certificate of status in evidence.

27. Section 403.412(6), Florida Statutes, provides:

> Any Florida corporation not for profit which has at least 25 current members residing within the county where the activity is proposed, and which was formed for the purpose of the protection of the environment, fish and wildlife resources, and protection of air and water quality, may initiate a hearing pursuant to s. 120.569 or s. 120.57, provided that the Florida corporation not for profit was formed at least 1 year prior to the date of the filing of the application for a permit, license, or authorization that is the subject of the notice of proposed agency action.

In this case, neither SOB nor STBR was formed at least a year prior to the filing of the Application. As a result, neither can take advantage of this statute as a basis for standing.

28. Section 403.412(5), Florida Statutes, states:

> Nothing herein limits or prohibits a citizen whose substantial interests will be determined or affected by a proposed agency action from initiating a formal administrative proceeding under s. 120.569 or s. 120.57. A citizen's substantial interests will be considered to be determined or affected if the party demonstrates it may suffer an injury in fact which is of sufficient immediacy and is of the type and nature intended to be protected by this chapter. No demonstration of special injury different in kind from the general public at large is required.[7] A sufficient demonstration of a substantial interest may be made by a petitioner who establishes that the proposed activity, conduct, or product to be licensed or permitted affects the petitioner's use or enjoyment of air, water, or natural resources protected by this chapter.[8]

29. There was no evidence that SOB or STBR themselves own property or otherwise would be affected by the proposed Project. Their standing is "associational" and is derived from their representation of their members. The requirements for "associational standing" in proceedings under Sections 120.569 and 120.57(1), Florida Statutes, are set out in Florida Home Builders Ass'n v. Dept. of Labor and Employment Security, 412 So. 2d 351

(Fla. 1982): instead of having to prove that the associations' own substantial interests would be affected, the associations would have to prove that a substantial number of their members would meet the standing test. They must prove: (a) that a substantial number of their members, although not necessarily a majority, are substantially affected by the proposed Project; (b) that the subject matter of the proposed Project is within the general scope of the interests and activity for which the organizations were created; and (c) that the relief requested is of the type appropriate for the organizations to receive on behalf of their members. See also Florida League of Cities, Inc. v. Department of Environmental Regulation, 603 So. 2d 1363 (Fla. 1992); Friends of the Everglades, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, 595 So. 2d 186 (Fla. 1st DCA 1992). The standing issues in this case relate to the first of the three requirements.

30. In this case, all six STBR members own beachfront property adjacent to the proposed Project, and all six would be affected by the proposed Project if it significantly reduced water quality, infringed on riparian rights, or proceeded without their required consent, as alleged. But it was not clear from the evidence if more than one of SOB's approximately 150 members own beachfront property in the proposed project area or would be affected by the proposed Project if it significantly reduced water quality, infringed on riparian rights, or proceeded without their required consent, as alleged.

31. In any event, as found, there will not be any lasting damage to natural resources, and

reasonable assurance was given that no water quality violations will occur and that exceedences of water quality standards in the mixing zone will be of short duration, lasting for no longer than an hour. These effects will not be substantial.

E. Water Quality

32. Among other things, Section 373.414(1), Florida Statutes, requires an "applicant [for a wetland/ environmental resource permit] to provide reasonable assurance that state water quality standards applicable to waters as defined in s. 403.031(13) will not be violated. . ." The term "reasonable assurance" is also found in Rule 62-4.070(1).9

33. An applicant need not provide an absolute guarantee. See ManaSota-88, Inc. v. Agrico Chemicals, Co. and Florida Department of Environmental Regulation, 12 F.A.L.R. 1319, 1325 (DER Feb. 19, 1990). Nor is it necessary for an applicant to eliminate speculation concerning what "might" occur. Chipola Basin Protective Group, Inc. v. Department of Environmental Regulation, Case No. 88-3355, 1988 WL 1859974 (Dept. Env. Reg. Dec. 29, 1988). "Reasonable assurance" requires an applicant to establish a "substantial likelihood that the project will be successfully implemented." Metro Dade County v. Coscan Florida, Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992).

34. The applicable water quality standard in this case is the turbidity standard for surface waters found in Rule 62-302.530(70): 29 or fewer

NTUs outside the mixing zone described in Rule 62-4.244(5). As found, the City and County provided reasonable assurance that the applicable water quality standard will not be violated.

F. Required Riparian Interest

35. The City and County seek a JCP, which includes two separate permits, and an authorization. The two permits included within a JCP are: a coastal construction permit governed by Chapter 161, Florida Statutes, and Rule Chapter 62B-41; and a wetland/ environmental resource permit10 governed by Chapter 373, Florida Statutes, and Rule Chapter 62-312. A JCP also includes a proprietary authorization to use sovereign submerged lands, which is governed by Chapter 253, Florida Statutes, and Rule Chapter 18-21. See Fla. Admin. Code R. 62B-49.001.

36. Rule Chapter 62B-49, entitled "Joint Coastal Permits and Concurrent Processing of Proprietary Authorizations," does not change the substantive requirements for obtaining a coastal construction permit, wetland/ environmental resource permit, or a proprietary authorization to use sovereign submerged lands. Rather, it provides a procedural mechanism for processing all three components of the JCP (*i.e.*, coastal construction permit, wetland/environmental resource permit, and/or a proprietary authorization to use sovereign submerged lands) at the same time. Rule 62B-49.001 specifically recognizes that:

> [t]he standards and criteria for issuance of environmental resource permits and coastal construction permits pursuant to Title 62, Florida Administrative Code, and proprietary authorizations pursuant to Chapters 18-18, 18-20, 18-21, Florida Administrative Code, shall be applicable to the review of joint coastal permits.

Rule 62B-49.005(2) provides that applicants for a JCP must submit all information required by Rule Chapters 62-312, 62B-41, and 18-21.

Rule Chapter 18-21

37. Under Section 253.03(1), Florida Statutes, the BOT "is vested and charged with the acquisition, administration, management, control, supervision, conservation, protection, and disposition of all lands owned by [the State]."

38. Section 253.77, Florida Statutes, provides: "A person may not commence any excavation, construction, or other activity involving the use of sovereign or other lands of the state, the title to which is vested in the board of trustees of the Internal Improvement Trust Fund under this chapter, until the person has received the required lease, license, easement, or other form of consent authorizing the proposed use."

39. Rule Chapter 18-21 was promulgated under the specific authority of Section 253.03(7),

Florida Statutes. Rule 18-21.004(3) provides in pertinent part:

> Riparian Rights.
> (a) None of the provisions of this rule shall be implemented in a manner that would unreasonably infringe upon the traditional, common law riparian rights, as defined in Section 253.141, F.S., of upland property owners adjacent to sovereignty submerged lands.
> (b) Satisfactory evidence of sufficient upland interest is required for activities on sovereignty submerged lands riparian to uplands, unless otherwise specified in this chapter. Public utilities and state and other governmental agencies proposing activities such as utility lines, roads or bridges must obtain satisfactory evidence of sufficient upland interest prior to beginning construction, but need not provide such evidence as part of any required application. Satisfactory evidence of sufficient upland interest is not required for activities on sovereignty submerged lands that are not riparian to uplands, or when a governmental entity conducts restoration and enhancement activities, provided that such activities do not unreasonably infringe on riparian rights.

40. Rule 18-21.003(49) defines satisfactory evidence of sufficient upland interest" as:

> documentation, such as a warranty deed; a certificate of title issued by a clerk of the court; a lease; an easement; or condominium, homeowners or similar association documents that clearly demonstrate that the holder has control and interest in the riparian uplands adjacent to the project area and the riparian rights necessary to conduct the proposed activity. Other forms of documentation shall be accepted if they clearly demonstrate that the holder has control and interest in the riparian uplands adjacent to the project area and the riparian rights necessary to conduct the proposed activity.

41. SOB and STBR take the position that the City and County have not provided a satisfactory evidence of sufficient upland interest." But the Application in this case falls squarely within the exception in the last sentence of Rule 18-21.004(3)(b), supra: no evidence of an upland interest is necessary "provided that such activities do not unreasonably infringe on riparian rights."11

42. One riparian right alleged to be infringed by the Application is the right to accretion. However, under the pertinent statutes, the riparian right to accretions (as well as the risk of erosion) will be eliminated upon recording of the ECL. Section 161.141, Florida Statutes, provides:

> The Legislature declares that it is the public policy of the state to cause to be

fixed and determined, pursuant to beach restoration, beach nourishment, and erosion control projects, the boundary line between sovereignty lands of the state bordering on the Atlantic Ocean, the Gulf of Mexico, or the Straits of Florida, and the bays, lagoons, and other tidal reaches thereof, and the upland properties adjacent thereto; except that such boundary line shall not be fixed for beach restoration projects that result from inlet or navigation channel maintenance dredging projects unless such projects involve the construction of authorized beach restoration projects. However, prior to construction of such a beach restoration project, the board of trustees must establish the line of mean high water for the area to be restored; and any additions to the upland property landward of the established line of mean high water which result from the restoration project remain the property of the upland owner subject to all governmental regulations and are not to be used to justify increased density or the relocation of the coastal construction control line as may be in effect for such upland property. The resulting additions to upland property are also subject to a public easement for traditional uses of the sandy beach consistent with uses that would have been allowed prior to the need for the restoration project. It is further declared that there is no

> intention on the part of the state to extend its claims to lands not already held by it or to deprive any upland or submerged land owner of the legitimate and constitutional use and enjoyment of his or her property. If an authorized beach restoration, beach nourishment, and erosion control project cannot reasonably be accomplished without the taking of private property, the taking must be made by the requesting authority by eminent domain proceedings.

Section 161.161(5), Florida Statutes, provides that the BOT shall approve or disapprove the ECL for a beach restoration project. Section 161.181, Florida Statutes, provides that, if no review is taken, or if the BOT'S decision is upheld on review, the BOT shall file its resolution approving the ECL in the public records and record the survey showing the area of beach to be protected and the ECL in the book of plats of the county or counties where the ECL lies. Section 161.191, Florida Statutes, states:

> (1) Upon the filing of a copy of the board of trustees' resolution and the recording of the survey showing the location of the erosion control line and the area of beach to be protected as provided in s. 161.181, title to all lands seaward of the erosion control line shall be deemed to be vested in the state by right of its sovereignty, and title to all lands landward of such line shall be vested in

> the riparian upland owners whose lands either abut the erosion control line or would have abutted the line if it had been located directly on the line of mean high water on the date the board of trustees' survey was recorded.
> (2) Once the erosion control line along any segment of the shoreline has been established in accordance with the provisions of ss. 161.141-161.211, the common law shall no longer operate to increase or decrease the proportions of any upland property lying landward of such line, either by accretion or erosion or by any other natural or artificial process, except as provided in s. 161.211(2) and
> (3) However, the state shall not extend, or permit to be extended through artificial means, that portion of the protected beach lying seaward of the erosion control line beyond the limits set forth in the survey recorded by the board of trustees unless the state first obtains the written consent of all riparian upland owners whose view or access to the water's edge would be altered or impaired.

Finally, Section 161.201, Florida Statutes, states:

> Any upland owner or lessee who by operation of ss. 161.141-161.211 ceases to be a holder of title to the mean high-water line shall, nonetheless, continue

> to be entitled to all common-law riparian rights except as otherwise provided in s. 161.191(2), including but not limited to rights of ingress, egress, view, boating, bathing, and fishing. In addition the state shall not allow any structure to be erected upon lands created, either naturally or artificially, seaward of any erosion control line fixed in accordance with the provisions of ss. 161.141-161.211, except such structures required for the prevention of erosion. Neither shall such use be permitted by the state as may be injurious to the person, business, or property of the upland owner or lessee; and the several municipalities, counties and special districts are authorized and directed to enforce this provision through the exercise of their respective police powers.

Since the Project cannot proceed without recording of the established ECL, there will be no infringement of any right to accretion, assuming the constitutionality of these statutes. (Alternatively, infringement of the right to accretion by issuance of the Draft Permit pending establishment of the ECL is not unreasonable.)

43. SOB and STBR also alleged that there is another riparian right infringed by the Draft Permit--the so-called "right to have the property's contact with the water remain intact." Board of Trustees of the Internal Improvement Trust Fund v.

Sand Key Associates, Ltd., 512 So. 2d 934, 936 (Fla. 1987).12. Actually, this right is no different than the riparian right to accretions (and relictions). As indicated, those rights (as well as the risk of loss of land by erosion) would be eliminated by establishment of the ECL, assuming the constitutionality of the pertinent statutes.

Rule Chapter 62B-41

44. SOB and STBR also contend that Rule 62B-41.005(3) requires the City and County to establish a riparian interest in the beach to be restored by their proposed Project, or establish that they have the consent of the owners of that land.

45. Rule 62B-41.005(3), which originally applied to coastal construction permits before they were combined with wetland/environmental resource permits to become JCPs under Rule Chapter 62B-49, states in pertinent part: "The Department will determine whether to authorize coastal construction at any coastal location upon receipt of an application from a property or riparian owner and upon consideration of the facts or circumstances . . . ." But Rule 62B-49.001 provides:

> This chapter implements the provisions of 161.055, Florida Statutes, establishing a joint coastal permit. A joint coastal permit is issued when both a coastal construction permit is required pursuant to Section 161.041, Florida Statutes, and an environmental resource permit pursuant to Part IV of

> Chapter 373, Florida Statutes, are required. This chapter also provides for concurrent review of any activity requiring a joint coastal permit that also requires a proprietary authorization for use of sovereign submerged lands owned by the Board of Trustees of the Internal Improvement Trust Fund. In the event there is a conflict between the procedural requirements of this chapter and other procedural rules promulgated pursuant to the referenced statutes, then this chapter shall govern. The standards and criteria for issuance of environmental resource permits and coastal construction permits pursuant to Title 62, Florida Administrative Code, and proprietary authorizations pursuant to Chapters 18-18, 18-20, 18-21, Florida Administrative Code, shall be applicable to the review of joint coastal permits.

(Emphasis added.) Therefore, while the standards and criteria for issuance of wetland/environmental resource permits and coastal construction permits pursuant to Rule Chapter 62 are expressly made applicable to JCPs, Rule Chapter 62B-49 controls in the event of any conflict.

46. Rule 62B-49.002(3) defines an applicant for a JCP to include:

> any . . . county, municipality, township, special district, or any public agency

> having authority, pursuant to Section 161.041, Chapter 253 or 258 and Part IV of Chapter 373, Florida Statutes, to request a permit, and if necessary, an authorization to conduct activities upon sovereign submerged lands of Florida.

(Emphasis added.) Section 161.041(1), Florida Statutes, specifically provides:

> If any person, firm, corporation, county, municipality, township, special district, or any public agency desires to make any coastal construction or reconstruction or change of existing structures, or any construction or physical activity undertaken specifically for shore protection purposes, or other structures and physical activity including groins, jetties, moles, breakwaters, seawalls, revetments, artificial nourishment, inlet sediment bypassing, excavation or maintenance dredging of inlet channels, or other deposition or removal of beach material, or construction of other structures if of a solid or highly impermeable design, upon sovereignty lands of Florida, below the mean high-water line of any tidal water of the state, a coastal construction permit must be obtained from the department prior to the commencement of such work.

In this case, both the City and the County desire to deposit beach material on sovereignty lands of the State of Florida below the MHWL for the purpose of shore protection and beach restoration pursuant to Sections 161.088–161.212, Florida Statutes, which provides for beach restoration and renourishment funded and sponsored by government, both State and local. It is not reasonable to interpret the applicable statutes and rules to require a local government to be the riparian owner of all the upland property which is subject to a beach restoration project. In fact, Section 161.201, Florida Statutes, expressly preserves the common-law rights of upland owners affected by beach restoration activities under Sections 161.141-161.211, Florida Statutes. DEP's interpretation that Rule 61B-41.005(3) is inapplicable to the Application in this case is reasonable, and the City and County are proper applicants for the JCP in this case. See Level 3 Communications, LLC v. Jacobs, 841 So. 2d 447 (Fla. 2003); Meszaros v. Dep't of Ag. and Consumer Servcs, 861 So. 2d 86 (Fla. 5th DCA 2003)(agency interpretation of rules and statutes it is charged with administering is entitled to deference).

47. Even if Rule 61B-41.004(3) were applicable, it merely provides that DEP will determine whether to authorize activity "upon receipt of an application from a property or riparian owner." Since both the City and County own riparian property within the Project area, they would appear to satisfy this generic requirement.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that DEP enter a final order issuing Draft Permit DEP JCP File No. 0218419-001-JC.

DONE AND ENTERED this 30th day of June, 2005, in Tallahassee, Leon County, Florida.

J. LAWRENCE JOHNSTON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of June, 2005.

ENDNOTES

1/ Technically, experts refer to an initial project to restore a beach by adding sand as restoration or nourishment, while renourishment technically refers to the addition of sand 8-12 years later to maintain

the "design beach" by replacing sand "sacrificed" to erosion during those years, as envisioned in the initial design.

2/ These included environmental assessments, engineering analyses, and detailed geotechnical studies.

3/ Specifically, proposed beach nourishment would occur along 4.8 miles of beachfront in the County, and the County owns four of the 275 parcels of beachfront property along that stretch. Proposed beach nourishment also would occur along two miles of beachfront in the City, and the City owns one of the 178 parcels of beachfront property along that stretch, plus six beach accesses. In addition, Okaloosa County, a partner with the City in the beach nourishment project, owns a parcel in the City in the project area.

4/ The survey for the County portion of the project, which was introduced in evidence as Petitioners' Exhibit 4, bears that date. It is not clear from the evidence whether the survey for the City portion of the project bears the same date, but it is inferred from the evidence that any difference in the dates of the surveys would not be significant.

5/ No party presented deeds to prove or refute beachfront ownership. The City and County argued in their PRO that it was necessary for SOB and STBR to introduce such deeds in evidence in order to prove ownership to the MHWL in the area of the proposed beach nourishment project. This argument

is rejected. The testimony and evidence in the record was sufficient to support this finding.

6/ All statutory citations are to the 2004 codification of the Florida Statutes.

7/ This statutory provision contradicts the Conclusion of Law proposed in the PRO filed by the City and County based on the decision in Grove Isle, Ltd. v. Bayshore Homeowners Ass'n, 418 So. 2d 1046 (Fla. 1st DCA 1982).

8/ The City and County argue in their PRO: "The purpose of the requirement for water quality assurances and, more specifically, the water quality standard of less than or equal to 29 NTU imposed by the Permit is to protect the fish and benthic communities within the Project area. The turbidity standard is not intended to ensure that waters are aesthetically pleasing during the construction of this, or any other beachfront Project. Thus, Petitioners fail to meet this requirement." But this statutory provision contradicts their argument, which must be rejected.

9/ All rule citations are to the current codification of the Florida Administrative Code.

10/ Within the Northwest Florida Water Management District, a "wetland resource permit" is required rather than an "environmental resource permit," which is required in the other four water management districts in the State. The minor distinction between the two permits has no effect on the issues in this case.

11/ Witnesses for the City and County suggested that ownership of some riparian property along the proposed Project site was sufficient under these rules, but the argument was not made in their PRO.

12/ During the hearing, this was referred to as the right for one's riparian property to remain in contact with the water." But riparian ownership only extends to the MHWL, and beachfront property usually is not in contact with the water.

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.

SUPREME COURT OF FLORIDA

THURSDAY, DECEMBER 18, 2008

CASE NOS.: SC06-1447; SC06-1449
Lower Tribunal No(s).: 1D05-4086

WALTON COUNTY, ET AL.

vs.

STOP THE BEACH RENOURISHMENT, INC., ET AL.

and

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, ETC.

vs.

STOP THE BEACH RENOURISHMENT, INC., ET AL.

Since there are not four votes to grant rehearing, respondent Stop the Beach Renourishment, Inc.'s motion for rehearing is denied.

QUINCE, C.J., and WELLS, ANSTEAD, PARIENTE, and LEWIS, JJ., concur. CANADY and POLSTON, JJ., did not participate.

A True Copy
Test:

_____

Thomas D. Hall
Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

CITY OF DESTIN and
WALTON COUNTY,

Petitioners,

Case No. SC-06-1447

vs.

DCA Case No.: 1D05-4086

STOP THE BEACH
RENOURISHMENT, INC.,

Respondent.

FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION and
THE BOARD OF TRUSTEES OF
THE INTERNAL IMPROVEMENT
TRUST FUND,

Petitioners,

Case No. SC06-1449

vs.

DCA Case No. 1D05-4086

STOP THE BEACH
RENOURISHMENT, INC.,

Respondent.

_____/

RESPONDENT'S MOTION FOR REHEARING, REHEARING EN BANC, OR CLARIFICATION

Respondent, Stop the Beach Renourishment, Inc. (STBR), by and through undersigned counsel, and pursuant to Fla. R. App. P. 9.330, hereby files its Motion for Rehearing, Rehearing En Banc, or Clarification. The Court has overlooked and misapprehended numerous factual, legal, and practical issues that mandate a rehearing before the entire Court.[1]

In Section I of this Motion, STBR first explains why the Court's opinion, dramatically changing Florida law, results in an uncompensated taking of private property contrary to the United States Constitution. In Section II, STBR discusses how the Court misapprehended the difference between the

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[1] It is recognized that motions for rehearing en banc are traditionally directed only at district courts of appeal. This case presents a unique and extraordinary case where two justices that participated in the original decision are unable to participate in the consideration of the Motion for Rehearing. *See* Fla. R. Jud. Admin. 2.205(3) (providing only former justices that are not practicing law to sit as senior justices). Because the issues raised in this case are of utmost constitutional importance, it is imperative that a full court of seven justices consider this Motion for Rehearing. Such a consideration may require the appointment of a district court of appeal judge to sit on this case given that Judge Polston – now Justice Polston – was the author of the unanimous First District Court of Appeal opinion (and opinion certifying a question of great public importance) on review in this case. See Save Our Beaches, Inc. v. Florida Dep't of Envt'l Protection, 31 Fla. L. Weekly D1173 (Fla. 1st DCA Apr. 28, 2006) and 31 Fla. L. Weekly 1811 (Fla. 1st DCA July 3, 2006).

single facial constitutional question and the numerous as-applied constitutional questions presented. Section III explains how the Court's "rephrased" question, certified to be of great public importance, overlooks the core question in the administrative permit case: the applicability of Fla. Admin. Code R. 18-21.004(3). Section IV discusses how the Court's opinion fails to resolve the case. Section V explains the Court's misapprehension of the doctrine of avulsion as it relates to "eroded" beaches. In Section VI, STBR explains how the Court overlooked its duty in a constitutional case. Finally, in Section VII, this Motion explains that the Court has violated its own precedent in deciding a new issue (*i.e*, facial constitutionality) that was neither briefed nor argued in the appeal nor is dispositive of the case.

I. The Court's opinion, in and of itself, results in a changing of Florida law and a taking under the United States Constitution.

The Court has overlooked and misapprehended the effect of its ruling on STBR's member's constitutional rights under the United States Constitution. As noted below, the effect of this Court's decision is an outright reversal of Belvedere and this Court's 97 years of precedent that holds littoral rights are constitutionally protected property rights that cannot be taken without compensation. Broward v. Mabry, 50 So. 826, 830 (Fla. 1909); Thiesen v. Gulf, Florida and Alabama Railway, 78 So. 491, 507 (Fla. 1917); Brickell v. Trammell, 82 So. 221, 227 (Fla. 1919); State of Florida v. Florida Nat'l Properties, Inc., 338 So. 2d 13, 17 (Fla. 1976); Belvedere Dev. Corp. v.

Department of Transp., 476 So. 2d 649, 652 (Fla. 1985); Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Assoc., Ltd., 512 So. 2d 934, 936 (Fla. 1987).

While the Court notes this precedent in passing, the Court then goes on to downplay the littoral right to accretion and right of access (which necessarily includes the right to maintain contact with the Mean High Water Line "MHWL") to effectively reverse this precedent.[2]

A. *Constitutionally Protected Right to Accretion*

After superficially acknowledging its 97 years of precedent, the Court, through contorting the law, proceeds to "redefine" littoral rights "in detail" so as to avoid an express reversal of precedent to uphold the Act:

> While Florida case law has clearly defined littoral rights as constitutionally protected private property rights, *the exact nature of these rights rarely has been described in detail.*

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[2] As noted below, the Beach and Shore Preservation Act, Chapter 161, Florida Statutes, ("Act") and the Court's opinion allow for the complete elimination of **all** littoral rights and replaces them with inferior statutory rights, which is a wholesale violation of the United States Constitution.

Walton County et al. v. Stop the Beach Renourishment, Inc., Nos. 06-1447 and 06-1449, slip op. at 16 (Fla. Sept. 29, 2008) (emphasis added). The Court then goes on to redefine the right to accretion in a manner – inconsistent with 97 years of legal history – that serves the purpose of upholding the Act:

> The right to accretion and reliction is a *contingent, future interest* that only becomes a posessory [sic] interest if and when land is added to the upland by accretion or reliction.

Walton County, at p. 17 (emphasis added). Having defined the right to accretion as a future right, the Court then goes on to conclude that it is not "implicated" presumably because the future will never happen as a result of the Act. Additional justification for the elimination of the right to accretion, which is discussed in detail below, is that there is no longer a need for the right because the Act statutorily solves the problem that accretion and reliction were created to solve. Despite the Court's proclamation that the littoral right of accretion "is not implicated," the Court's opinion has the effect of approving its elimination without compensation (as discussed in detail below), and thus is a taking under the Fourteenth Amendment to the United States Constitution.

B. *Littoral right of access (which necessarily includes to the right to maintain contact with the MHWL)*

The Court holds for the first time that the constitutional right to have upland property remain in contact with the MHWL is "ancillary," and demotes it to a status that is no longer worthy of constitutional protection solely because the Act replaces it with a statutory "right of access." This new distinction appears to be a strained effort to avoid an express reversal of the Court's holding in Sand Key, which unequivocally holds that the right to have the property remain in contact with the MHWL is a part of and not separate from the right to access. Sand Key, 512 So. 2d at 936 (holding that littoral rights include the vested right "of access to the water, including the right to have the property's contact with the water remain intact").

The Court then goes on to state, "[w]e have never addressed whether littoral rights are unconstitutionally taken based solely upon the loss of an upland owner's direct contact with the water," and holds that "under Florida common law, there is no independent right of contact with the water." Walton County, p. 32. Whether the right to have an upland property remain in contact with the MHWL is an independent right or part of the right to access is a distinction without a difference; it also is completely irrelevant to the core question of whether a taking has occurred. If it is part of the right to access, then the Act has taken the upland owner's constitutional littoral right to access (and replaced it with a statutory right).[3] If it is an independent littoral right, it has still been taken.

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[3] The Court's analysis appears to create subcategories of littoral rights in an attempt to reach the result that part of a

This newly-created judicial distinction does not change the outcome and effect of the Court's ruling. The Court's opinion and its analysis merely camouflage the taking to portray the image that it is constitutionally acceptable.

C. *The Court's reversal of Florida's constitutional protections of littoral rights, itself, results in a taking under the United States Constitution as explained in Hughes v. Washington, 389 U.S. 290 (1967).*

The United States Supreme Court rejected the State of Washington's attempt to take an upland owner's property and littoral rights and give them to the state. Hughes, 389 U.S. 290 (1967). In Hughes, the issues before the Washington Supreme Court related to the ownership of lands that had accreted before and after the State of Washington had joined the Union. Despite prior common law to the contrary, the Washington Supreme Court, interpreting a provision of its constitution in 1966, held that the state constitution terminated the littoral rights of upland owners as of 1889 when Washington became a State and owner of all tidelands. Id. at 291.

The case, when it was decided by the Supreme Court of Washington, was very controversial, and surprisingly similar to the instant case, with two dissenting justices noting that the majority opinion was guided by the result desired and not the law:

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littoral right can be taken abut not rise to a violation of the constitution.

> I find myself lost in admiration at the scholarship and erudition manifested in the majority opinion. However, all the legal signposts that I can read And [sic] understand point in the opposite direction, so I am compelled to dissent.
>
> * * *
>
> If this seems a ridiculously short and simple solution of the apparently complex problem with which the majority opinion deals, I can only say that it is the result dictated by common law . . . It is [sic] plain and well-traveled legal path. To arrive at the result the state desires (and the majority approves), a new, circuitous and rather devious route, rarely explored, must be followed.

Hughes v. State of Washington, 410 P.2d 20, 30 (Wash. 1966) (Judge Hill, dissenting).

While the United States Supreme Court reversed applying federal law, Justice Stewart concurred and addressed the propriety of the Washington Supreme Court's judicial elimination of littoral rights through interpretation of its constitution. Justice Stewart first noted that "Washington or any other State is free to make changes, either legislative or judicial, in its general rules of real property law, including the rules governing the property rights of riparian owners" so

long as the "State not take her land without just compensation." Id. at 295. Justice Stewart then turned to the question of whether the Washington Supreme Court's 1966 judicial interpretation of its constitution to hold that all littoral rights were terminated in 1889 "constitutes a sudden change in state law, unpredictable in terms of the relevant precedents" such that a taking has occurred:

> For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.

Id. at 296-97.

Whether the Washington Supreme Court's decision "worked an unpredictable change in state law . . . inevitably presents a federal question" for determination by a federal court. Id. at 297. While the Washington Supreme Court attempted to finesse its way around prior precedent and rely on inapplicable cases claiming its decision was "not startling," Justice Stewart stated:

> I can only conclude, as did the dissenting judge below, that the state court's most recent construction of Article 17 [of its constitution] effected an unforeseeable change in Washington property law as expounded by the State Supreme Court.

Id. at 297.

In finding the Washington Supreme Court's decision to change state property law to be a taking under the Due Process Clause of the Fourteenth Amendment, Justice Stewart eloquently stated the rationale:

> There can be little doubt about the impact of that change upon Mrs. Hughes: The beach she had every reason to regard as hers was declared by the state court to be in the public domain. Of course the court did not conceive of this action as a taking. As is so often the case when a State exercises its power to make law, or to regulate, or to pursue a public project, pre-existing property interests were impaired here without any calculated decision to deprive anyone of what he once owned. But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does. Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property-without paying for the privilege of doing so. **Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a**

> **taking is unintended than when it is deliberate, I join in reversing the judgment.**

Id. at 297-298.[4]

While there is no doubt that this Court does not intend to create a taking, the effect of its decision has that very effect. As Justice Stewart noted, no matter what this Court "says" in its opinion it is doing or how it attempts to justify the result, a taking is measured by what the opinion **does**. In this case and as discussed in detail below, the Court's opinion effects an unforeseeable change in Florida law in violation of the Due Process Clause of the Fourteenth Amendment. The opinions of dissenting Justices Wells and Lewis would appear to support this conclusion.

Accordingly, this Court should grant rehearing as it overlooked and misapprehended the effect of its ruling under the Due Process Clause of the Fourteenth Amendment and Hughes.

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[4] Accord Ultimate Sportsbar, Inc. v. United States, 48 Fed. Cl. 540, 550 (Fed. Cl. 2001) (finding a "judicial taking occurs where a court's decision that does not even 'arguably conform[ ] to reasonable expectations' in terms of relevant law of property rights effects a 'retroactive transformation of private into public property.'"); Robinson v. Ariyoshi, 753 F.2d 1468, 1474 (9th Cir. 1985) (finding Hawaii Supreme Court's change of century old common law relating to water rights was a judicial taking under Hughes) rev'd on procedural grounds, Ariyoshi v. Robinson, 477 U.S. 902 (1986); Sotomura v. County of Hawaii, 460 F.Supp. 473, 480-481 (D.C. Haw. 1978) (finding the Hawaii's Supreme Court's decision changing the well-established historical boundary line of beachfront properties to violate the Fourteenth Amendment of the United States Constitution).

II. The Court misapprehended the law relating to facial and as-applied constitutional challenges.

In changing the fundamental issue to be decided, the Court misapprehended the law relating to constitutional challenges. The law is well-established that, in an as-applied challenge, a court assumes the facial constitutionality of the statute and reviews the specific manner in which the statute is applied to a specific set of facts. Ogborn v. Zingale, 988 So. 2d 56, 59 (Fla. 1st DCA 2008) quoting Cashett v. State, 873 So. 2d 430, 434 (Fla. 1st DCA 2004). Conversely, in a facial challenge, the court looks only to the words of the statute to decide the case. Florida Dep't of Revenue v. City of Gainesville, 918 So. 2d 250, 256 (Fla. 2005). Given this law, it is inexplicable how the Court concludes that this challenge was solely a facial challenge.[5]

In this case, numerous disputed facts were determined before an ALJ in an administrative hearing. A sampling of the factual issues that the ALJ found, and DEP and the First District applied to the law in this case, include:

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[5] In fact, the Court implicitly recognizes that it cannot honestly say the challenge below was solely a facial challenge; hence the Court's repeated use of the qualifier "essentially." Walton County, p. 2 ("what is essentially a facial challenge"); p. 30 note 15 ("what is essentially a facial challenge").

1) That STBR's members no longer possess the right to accretion after the Erosion Control Line ("ECL") was recorded in this case.
2) That the State or local governments did not institute eminent domain proceedings or pay compensation under 161.141, Florida Statutes.
3) That the recording of the ECL has fundamentally changed the boundary of STBR members' properties.
4) That the boundary of their properties are no longer the MHWL.
5) That the recording of the ECL has "unreasonably infringed" on STBR's member's riparian rights such that the Department of Environmental Protection (DEP) must require the permit applicants to provide "satisfactory evidence of sufficient upland interest" pursuant to Fla. Admin. Code R. 18-21.004(3).

The Court overlooks these factual issues as well as their application to the law in the instant case. While one facial issue may be presented, the remaining issues present as-applied challenges. Coincidentally, the Court failed to decide the one facial challenge to the Act that is presented. Even assuming the facial challenge can be overcome, numerous related, as-applied challenges must be addressed. In an attempt to simplify the analysis, the issues will be presented separately followed by the discussion of the facial aspect and the as-applied aspects to the issues that the Court overlooked.

A. ***Constitutional Issue No. 1*** – *Is* section 161.191, Florida Statutes, which expressly modifies common law to eliminate the littoral right to accretion, unconstitutional?

i. *Facial Challenge* - From a facial standpoint, the **only** way this section is constitutional is if littoral rights can be severed from the uplands. This Court improperly overlooked the holding in Belvedere that provides that littoral rights cannot be severed from uplands absent agreement from the property owner, even by eminent domain. The Court's attempt to distinguish Belvedere as a condemnation case misses the point that littoral rights are taken either way. That the taking in Belvedere was in the context of a condemnation case has little relevance to the resulting effect on property rights.

Whether the littoral rights are severed by an agency in eminent domain proceedings or by other statutorily-authorized act, the result is the same: littoral rights are severed from the upland property. The process by which that severance occurs is of no moment. The Court in Belvedere addresses this very point finding the rights could not be severed absent an agreement with the landowner. Thus, in deciding this case this Court overlooked the import and holding of Belvedere. To the extent this Court now disagrees with Belvedere, it should expressly overrule it and not "distinguish" it on superficial grounds in an attempt to avoid its unequivocal holding.

Second, in deciding the facial challenge, this Court has overlooked Section 253.141(1), Florida Statutes, which defines riparian rights as follows:

> Riparian rights are those incident to land bordering upon navigable waters. They are rights of ingress, egress, boating, bathing, and fishing and such others as may be or have been defined by law. . . . **They are appurtenant to and are inseparable from the riparian land.** The land to which the owner holds title must extend to the ordinary high watermark of the navigable water in order that riparian rights may attach. . .

§ 253.141(1), Florida Statutes (emphasis added). The Court obviously overlooked this section. Even if this Court overrules Belvedere, Section 253.141, Florida Statutes, would by its terms prevent any severance of riparian (or littoral) rights.

Ordinarily, the Legislature is free to eliminate or take constitutional property rights when it provides just and fair compensation. Thus, assuming Belvedere is overruled and the Court somehow overcomes the prohibition on severance of littoral rights in Section 253.141, Florida Statutes,[6] the Act would otherwise be

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[6] If this Court follows the holding of Belvedere and Section 253.141, Florida Statutes, then the State or local government sponsoring a beach nourishment project would have to condemn at least a small portion of upland property that adjoined the MHWL in order to acquire the littoral rights that attach thereto.

facially constitutional because Section 161.141, Florida Statutes, expressly provides that the compensation must be paid if property rights are taken.

ii. *As-applied Challenge* – The analysis in an as-applied challenge involves three prongs: 1) whether a constitutionally protected property right exists; 2) whether it has been taken as a result of the government's actions; and 3) whether just and fair compensation was paid. Ex parte Wise, 192 So. 872, 875-76 (Fla. 1940). The Court misapprehended this analysis and failed to answer the relevant issue. First, the Court recognized that more than 97 years of case law has held that littoral rights in Florida are constitutionally protected property rights that cannot be taken without just compensation. Walton County, p. 15.

The Court, however, failed to analyze the second prong. While the Court acknowledge the constitutional nature of littoral rights, it proceeded to belittle the importance of the project would have to condemn at least a small portion of upland property that adjoined the MHWL in order to acquire the littoral rights that attach thereto, littoral right to accretion. In fact, the Court went so far as to say that it is a "contingent, future interest that only becomes a possessory interest if and when land is added to the upland by accretion or reliction." Walton County, p. 17, 30. The Court, however, does not explain the import of this statement. Even if the right to accretion is indeed a "contingent future interest," it has been such a contingent future interest worthy of constitutional protection for 97 years. The Court's

opinion implies, without expressly stating, that the right to accretion is now not worthy of such protection because the Court labels it a "contingent future interest."

Again, after noting the right to accretion is a "contingent right," the Court then goes on to conclude that the right of accretion is not "implicated" by the Act. Walton County, p. 30-32. This conclusion can only be an oversight. It is inexplicable that a property right which is expressly terminated by the Act is not "implicated"? Is it that the Court saying the upland property owners continue to possess a right to accretion that will not be affected by the beach nourishment? If it is not "implicated" by the Act, then what happens to the landowner's right to accretion? Where does the right go? Who possesses it?

The Court has confused and misapprehended the issue of the existence of the right and the **need** for the right to accretion. In fact, the Court's entire analysis discusses why there is no **need** for the right to accretion under the Act thereby finding it inapplicable or not "implicated." While there may be no **need** for the right to accretion given the Act's provisions, the fact is the right to accretion has existed for 97 years and is a constitutionally protected right. It cannot be merely cast aside by the Legislature – and now this Court – because it is no longer "needed."

Need for a constitutional right is wholly irrelevant to the constitutional taking analysis. Accordingly, the Court's conclusion that the right to accretion is no longer **needed** overlooks the constitutional question of whether it has been taken.

The answer to that question is obvious given the Act's express extinguishment of the right to accretion and this Court's 97 year history of protecting such a right. That the Court overlooked this issue is quite surprising when all the parties acknowledge and admit that the right to accretion has been eliminated, See County/City Initial Brief p. 12-15; See DEP's Final Order, p. 5, albeit the Petitioners argue the taking is regulatory and noncompensable. Accordingly, the Court has overlooked the pertinent issue and should on rehearing decide whether the right to accretion continues to exist or has been taken.

B. ***Constitutional Issue No. 2*** – Is section 161.201, Florida Statutes, which replaces constitutional littoral rights with statutory rights unconstitutional **as-applied**?

Assuming that littoral rights can be severed at all from upland property, the next question becomes whether the replacement of constitutional property rights with statutory property rights is permissible without compensation. It should be noted here that this question is not a facial challenge because it is recognized that the Act is **capable** of being applied in a constitutional manner, *i.e.*, through the payment of just compensation as Section 161.141, Florida Statutes, requires. The facts of the case, however, inform us that the Petitioners did not apply the Act in a constitutional manner because they did not pay any compensation or institute eminent domain proceedings.

The Court completely failed to address this issue. Although the Court repeatedly trumpeted the attempt in Section 161.201, Florida Statutes, to "preserve" common law littoral rights, the Court overlooks the fundamental and elementary issue of whether a statute can divest a property owner of constitutional rights and replace them statutory rights. Walton County, p. 9.

In this case, the record reflects that prior to the Petitioners' recording of the ECL under the Act, the boundary of STBR's members' properties, was the MHWL. After the recording of the ECL, the property boundary is the ECL. As a result, STBR members are no longer littoral owners and possess no constitutional littoral property rights. Miller v. Bay to Gulf, Inc., 193 So. 425, 427 (Fla. 1940) (littoral rights only attach to property when it borders the MHWL). Rather, by operation of law, STBR members are now benefactors of statutory rights of access, use, and view designed to mimic constitutional littoral rights.

It is impossible for a statute to "preserve" constitutional rights. Constitutional rights exist as a matter of constitutional law – not statutory law – and are protected by the Constitution itself. Department of Revenue v. Kuhnlein, 646 So. 2d 717, 721 (Fla. 1994) ("[N]either the common law nor a state statute can supersede a provision of the federal or state constitutions"); Austin v. Christian, 310 So. 2d 289, 293 (Fla. 1975) ("A statute enacted by the Legislature may not constrict a right granted under the ultimate authority of the Constitution"); see also Cooper v. Aaron, 358 U.S. 1, 17-19 (1958) (holding constitutional

rights cannot be nullified by action of state legislator, executive, or judicial officer).

Surely this Court would agree that the Legislature cannot eliminate a citizen's constitutional right to free speech and replace it with a statutory right. Id.[7] What about the constitutional right of access to the courts, the right to equal protection, the right to due process, the right to privacy, etc.? Such a principle is elementary. Cooper, 358 U.S. at 18-19 ("It is necessary only to recall some basic constitutional propositions which are settled doctrine" which includes that the constitution is the supreme law of the land).

The Court has misapprehended the unconstitutional result of the Legislature's attempt to replace constitutional rights with statutory rights. Case law is clear that such an attempt is unconstitutional and a violation of the state and federal constitutions. Kuhnlein, 646 So. 2d 717; Cooper, 358 U.S. 1.

While praising these statutory replacement rights, the Court's opinion fails to recognize that the Legislature is free to change or amend Section 161.201, Florida Statutes, at any time, eliminating any of the privileges or limitations provided therein. Unlike a littoral owners' ability to enforce its constitutional rights, the Act fails to provide any cause of action for the State's violation of any of the

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[7] Kuhnlein, 646 So. 2d at 721 (finding that "[s]overeign immunity does not exempt the State from a challenge based on violation of the federal or state constitutions, because any other rule self-evidently would make constitutional law subservient to the State's will.").

limitations in Section 161.201, Florida Statutes, much less a cause of action that provides for just compensation if these replacement statutory rights are eliminated or reduced.

It is obvious from the Court's opinion that it is greatly concerned with ensuring the State's beach nourishment program remains intact. While such a goal is noble, the Court's duty is to strictly interpret the law and uphold constitutional rights against infringements. In the unfortunate event that a worthwhile regulatory program infringes on such constitutional rights, it is the Legislature's duty to solve the problem, not this Court's.

III. The Court's "rephrased"[8] question overlooks the single issue at the heart of the case: the applicability of Fla. Admin. Code R. 18-21.004(3).

While the Court brushes the First District's certified question aside and replaces it with a materially different question, the Court overlooks the validity of the very administrative action giving rise to the case. A simple finding of facial constitutionality as discussed in the Court's opinion does nothing to address the underlying administrative issue: i.e., whether DEP properly

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[8] The Court's statement that it "rephrases" the question is perplexing. To "rephrase" a question is to "express the same message in different words." See http://www.webster-dictionary.org/definition/rephrase (Webster's Revised Unabridged Dictionary 1913). The Court's new certified question presents an entirely different message than the original certified question.

issued the Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands ("JCP") without requiring the City and County to provide "satisfactory evidence of sufficient upland interest" pursuant to Fla. Admin. Code R. 18-21.004(3). Specifically, the issue before the First District was whether the City and County qualified for the exception in Fla. Admin. Code R. 18-21.004(3) which provides that:

> satisfactory evidence of sufficient upland interest is not required . . . when a governmental entity conduct restoration and enhancement activities, provided that such activities do not unreasonably infringe on riparian rights.

The Court does not answer this question.[9] The answer to this question necessarily requires an application of the facts found at the administrative hearing to determine if the beach nourishment

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[9] The Court overlooks that the First District expressly decided this question as it was a fundamental part of STBR's appeal of the administrative action and its constitutional claim. *Save Our Beaches*, 31 Fla. L. Weekly at 1176 (holding that "because those riparian rights have been infringed, contrary to the Department's ruling, satisfactory evidence of sufficient upland interest required by rule 18-21.004(3) must be provided."). In fact, the First District even includes the applicability of Fla. Admin. Code R. 18-21.004(3) in its certified question because it is fundamental to resolution of the case. Thus, the Court's statement in footnote six that "STBR did not seek reversal" based on whether the City and County obtained the necessary property rights is incorrect. Walton County, p. 5.

project in this case unreasonably interferes with the riparian rights of STBR's members. Thus, the Court's determination of facial constitutionality does nothing to resolve the underlying issue.

IV. The Court's opinion fails to resolve the case.

The Court's opinion simply quashes the First District's opinion without remanding or disposing of the case as to the administrative issue presented. This Court's ruling does not address the validity of the permit issued by DEP in this case. Rather, this Court's decision merely says that the Act is capable of being applied in a constitutional manner . . . which begs the question as to whether it was so applied in the specific context of the facts of this case? Moreover, Fla. Admin. Code R. 18-21.004(3) presents a completely different question than the takings issue, i.e., whether the permit "unreasonably infringes" on riparian rights.

If this Court does not decide the issues left open by its opinion, it should remand the case to the First District to determine the validity of the administrative action.

V. The Court misapprehends the effect of the doctrine of avulsion in relation to "eroded" beaches.

The Court's opinion, which initially and correctly restates the common law doctrine of avulsion, later contains statements that inaccurately apply or contradict this doctrine. Accordingly, this Court

should grant rehearing to clarify the application of the doctrine.

The doctrine of avulsion recognizes that the boundary between public submerged lands and private uplands does not change due to an avulsive event and it remains at the location of the MHWL as it existed prior to the avulsive event. Walton County, p. 27. Moreover, the doctrine allows either party that loses land due to the avulsive event to reclaim that land. Id. At 28.

In the vast majority of cases (and specifically in this case), a beach restoration project is proposed to renourish beaches that have been "critically eroded" by hurricanes (which are evulsive events).[10] In such cases, hurricanes cause a significant part of the once dry sandy beach (landward of the MHWL) to wash away and become submerged as the actual water line moves drastically landward. Thus, the hurricane's effect is to cause privately owned dry sandy beach located landward of the previously existing MHWL to become submerged under water. As a result, the water has now significantly encroached onto the upland owner's property. In such cases, the pre-hurricane MHWL is now located some distance out into and under the water. Thus, the former dry sand area located beneath the water is the upland owner's – not the State's – to reclaim.

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[10] The Court itself notes that the shoreline was "critically eroded" in this case by Hurricane Opal in 1995, Hurricane Georges in 1998, Tropical Storm Isidore in 2002 and Hurricane Ivan in 2004. Walton County, p. 3, n 4.

Several statements in the Court's opinion appear to contradict or confuse the avulsion doctrine. First, the Court states that "if the shoreline is lost due to an avulsive event, the public has the right to restore its shoreline up to that MHWL." Walton County, p. 29. If the shoreline is lost due to an avulsive event, it is the upland owner that loses beach, not the State as the actual water line moves landward. The State only "loses" property when the actual water line moves **seaward** as a result of an avulsive event, thereby leaving dry land where submerged lands once were.

The Court next states that "the Act authorizes the State to reclaim its storm-damaged shoreline by adding sand to submerged sovereignty lands." Walton County, p. 29. This statement overlooks the fact that the land now covered by the water as a result of the hurricane (out to the pre-hurricane MHWL) is the upland owner's and is not sovereign land, as sovereign lands would exist only seaward of the pre-hurricane MHWL.

Thus, the State, as the owner of sovereign submerged lands, can only "lose" property during an avulsive event when dry land is formed on what were submerged lands.[11] In such a case, the State is authorized by the common law to reclaim that land by removing the sand on the new dry area and returning it to submerged lands. In the context of a critically eroded beach, when the actual water line moves landward as a result of a hurricane, the State cannot and does not "lose" any property.

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[11] To the extent the State is the owner of the upland property such as a state park, it can then lose property in an avulsive event similar to other upland property owners.

Recognizing the proper application of the doctrine of avulsion in a critically eroded beach context, it is apparent that the actions allowed by the Act are not synonymous with what the common law allows. At common law, only the owner of the upland property can reclaim lands that have been submerged by a hurricane. Moreover, under common law, the doctrine of avulsion does not provide for a permanent fixed boundary. Rather, it allows the party losing land to reclaim it to the pre-avulsive event MHWL and the ambulatory MHWL then continues to be the boundary between the properties. Unlike the common law, the Act sets a permanent boundary line between the upland owner and the State. § 161.141, Florida Statutes.

Because the Court misapprehended the doctrine of avulsion, it should grant rehearing.

VI. The Court overlooks its duty in constitutional cases.

"The duty of this Court 'to maintain the constitution as the fundamental law of the state is imperative and unceasing.'" North Fla. Women's Health and Counseling Servs., Inc. v. State, 866 So. 2d 612, 658 (Fla. 2003) (Quince, J., concurring). In so doing "it is not the role of the courts to set policy or to engage in judicial legislation." Id. As an independent judiciary, its duty is to simply interpret the law without regard to emotion, politics or the practical effect of its decision. Id. at 639.

In this case, the Court has misapprehended its responsibility to uphold the Constitution by creating some sort of "balancing test" to determine if the Act violates the Constitution, much like the balancing test used by the Legislature in enacting new laws. Specifically, the Court goes to great lengths trumpeting the Act's purpose and intent to conclude that the Act "achieves a reasonable balance of interests and rights to uniquely valuable and volatile property interests." Walton County, p. 24.[12] While that may in fact be the case, "reasonably balancing" citizens' constitutional rights is not the standard or controlling test.

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[12] In its recitation of the interests balanced by the Act, the Court either overlooks or misstates the application and effect of the Act. For example, the Court states:

> [T]he Act provides for the cancellation of the ECL if (1) the beach restoration is not commenced within two years; (2) restoration is halted in excess of a six-month period; or (3) the authorities do not maintain the restored beach. See § 161.211. Therefore, in the event the beach restoration is not completed and maintained, the rights of the respective parties revert to the status quo ante.

Walton County, at 24. Omitted from this statement is the fact that the ECL can be cancelled by the Board of Trustees of the Internal Improvement Trust Fund upon a "written petition signed by the owners or lessees of a majority of the lineal feet of riparian property lying within the erosion control project." § 161.211, Florida Statutes. The Court's characterization of the Act minimizes the real impact on the upland owner's constitutional property rights.

Considering that the Court cites to no legal precedent in Section II.B of its opinion that creates this new judicially-created reasonable balancing test, it appears that the Court lost sight of the legal issues and drifted into the forbidden world of policy-making. Not one case is cited that supports the Court's test that fundamental constitutional rights can be infringed, abrogated, or even eliminated so long as a "reasonable" balance is achieved.

There is little doubt that intentions and purposes of the Act are noble, worthy, and important to the State. Those facts, however, cannot and must not cloud the judiciary's vision to carry out its duty to determine if a law passes constitutional muster. Perhaps this Court said it best itself:

> Sitting as a Court, however, we cannot be ruled by emotion. Rather, we are sworn to uphold the law of this State and to decide each case deliberately, based solely on the law. Although this obligation to apply the law objectively is at times a difficult undertaking, the alternative is untenable:
>
> > Although this legal precept-and indeed the rule of objective, dispassionate law in general-may sometimes be hard to abide, the alternative-a Court ruled by emotion-is far worse.
>
> Jones v. State, 705 So. 2d 1364, 1367

(Fla. 1998).

> As with any case that comes before us, we cannot decide the present case based on our own assessment of the weight of the competing moral arguments. Rather, we address a conventional legal issue: Did the trial court err in holding the Act unconstitutional?

North Fla. Women's Health and Counseling Servs., Inc., 866 So. 2d at 639.

The Court has steadfastly stricken down laws that infringe on constitutional rights, as it must. When confronted, however, with the scenario that its decision could be inequitable or devastating to a litigant, the Court has refused to ignore the law and decide the case based on equities. In Savona v. Prudential Ins. Co. of America, 648 So. 2d 705, 707 (Fla. 1995), this Court, while recognizing the "result in this case appears inequitable" and creates a "hardship," refused to judicially create a remedy. Rather, the Court "request[ed] that our Legislature reconsider this very real problem." Id.

Having misapprehended and applied the incorrect legal test, this Court should grant rehearing, decide the case on the law and request the Legislature to fix any issues with the Act that may create inequities.

VII. The Court decided a case and issue that was not litigated below, and

that was neither briefed nor argued on Appeal.

In this case the parties briefed the as-applied certified question presented by the First District that was accepted by this Court as a basis for jurisdiction. At no time before or after the briefing or oral argument in this case, did the Court notify the parties that it would decided a completely different – and legally distinct – question than the one presented.

While the Court has the authority to reach issues beyond the certified question, it has repeatedly refused to do so except in the most exceptional of cases and where the "issues have been properly briefed and argued, and are dispositive of the case." Savona v. Prudential Ins. Co. of America, 648 So. 2d 705, 707 (Fla. 1995).[13] This principle is rooted in due process and fundamental fairness considerations.

The Court, in this case, violated the very limitation it has imposed upon itself. First, the issues related to a "facial" challenge were not "properly briefed" nor argued before the Court. Rather, the Court materially and fundamentally changed the legal issue in dispute with no opportunity for the parties to address a fundamentally and completely different

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[13] ("We have held that we have the authority to consider issues other than those upon which jurisdiction is based, but this authority is discretionary and should be exercised only when these other issues have been properly briefed and argued, and are dispositive of the case."); accord Savoie v. State, 422 So. 2d 308 (Fla.1982); Battle v. State, 911 So. 2d 85, 90 (Fla. 2005) (Quince, J.) (dissenting in part, concurring in part); Caufield v. Cantele, 837 So. 2d 371, 377 n.5 (Fla. 2002).

legal issue. It cannot be seriously argued with any intellectual honesty that an as-applied constitutional challenge and a facial challenge present the same legal and factual issues and analyses. Accordingly, the Court should have provided the parties with an opportunity to brief and argue the facial challenge.

Perhaps more egregious is the Court's consideration of the new "facial" challenge when it is not even dispositive of the case. As noted above, the determination of whether the Act is facially constitutional does not answer the question of whether the JCP permit issued by DEP in this fact specific case was valid under Fla. Admin. Code R. 18-21.004(3). Accordingly, the Court's own rulings demand that the Court grant rehearing before a full court of seven justices to provide the parties with an opportunity to brief and argue the issues that the Court should decide.

Conclusion

This case presents a question of paramount constitutional importance under both the Florida Constitution and the United States Constitution. It is therefore essential that a full court of seven justices consider this Motion for Rehearing. As a result of the numerous issues overlooked and misapprehended, the Court should grant rehearing. More specifically, rehearing should be granted because the Court decided an issue not briefed or argued, applied the wrong legal standard, failed to address the as-applied constitutional questions, and failed to resolve the case, all of which results in an violation of the United States Constitution.

It must be remembered that no matter how admirable or well intentioned the goals or public policy behind the Act, the Constitution and the judiciary that defend it is a citizen's last protection against a wayward government. As noted by the United States District Court in Sotomura v. County of Hawaii, 460 F.Supp. 473, 481 (D.C. Haw. 1978):

> The [Hawaii Supreme Court's] decision in Sotomura was contrary to established practice, history and precedent and, apparently, was intended to implement the court's conclusion that public policy favors extension of public use and ownership of the shoreline. A desire to promote public policy, however, does not constitute justification for a state taking private property without compensation. The Fourteenth Amendment to the Constitution forbids it.

The Florida Constitution, as well as the United States Constitution, forbids the Petitioners' actions in this case. Accordingly, this Court should grant rehearing and affirm the First District's decision.

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§ 161.161, Florida Statutes: Procedure for approval of projects.—

(1) The department shall develop and maintain a comprehensive long-term management plan for the restoration and maintenance of the state's critically eroded beaches fronting the Atlantic Ocean, Gulf of Mexico, and Straits of Florida. The beach management plan shall:

(a) Address long-term solutions to the problem of critically eroded beaches in this state.

(b) Evaluate each improved, modified, or altered inlet and determine whether the inlet is a significant cause of beach erosion. With respect to each inlet determined to be a significant cause of beach erosion, the plan shall include:

1. The extent to which such inlet causes beach erosion and recommendations to mitigate the erosive impact of the inlet, including, but not limited to, recommendations regarding inlet sediment bypassing; modifications to channel dredging, jetty design, and disposal of spoil material; establishment of feeder beaches; and beach restoration and beach nourishment; and

2. Cost estimates necessary to take inlet corrective measures and recommendations regarding cost sharing among the beneficiaries of such inlet.

(c) Design criteria for beach restoration and beach nourishment projects, including, but not limited to:

1. Dune elevation and width and revegetation and stabilization requirements; and

2. Beach profile.

(d) Evaluate the establishment of feeder beaches as an alternative to direct beach restoration and recommend the location of such feeder beaches and the source of beach-compatible sand.

(e) Identify causes of shoreline erosion and change, calculate erosion rates, and project long-term erosion for all major beach and dune systems by surveys and profiles.
(f) Identify shoreline development and degree of density and assess impacts of development and shoreline protective structures on shoreline change and erosion.
(g) Identify short-term and long-term economic costs and benefits of beaches, including recreational value to user groups, tax base, revenues generated, and beach acquisition and maintenance costs.
(h) Study dune and vegetation conditions.
(i) Identify beach areas used by marine turtles and develop strategies for protection of the turtles and their nests and nesting locations.
(j) Identify alternative management responses to preserve undeveloped beach and dune systems, to restore damaged beach and dune systems, and to prevent inappropriate development and redevelopment on migrating beaches, and consider beach restoration and nourishment, armoring, relocation and abandonment, dune and vegetation restoration, and acquisition.
(k) Establish criteria, including costs and specific implementation actions, for alternative management techniques.
(l) Select and recommend appropriate management measures for all of the state's sandy beaches in a beach management program.
(m) Establish a list of beach restoration and beach nourishment projects, arranged in order of priority, and the funding levels needed for such projects. The beach management plan may be prepared at the regional level based upon areas of greatest need and

probable federal funding. Such regional plans shall be components of the statewide beach management plan and shall serve as the basis for state funding decisions upon approval in accordance with chapter 86-138, Laws of Florida. In accordance with a schedule established for the submission of regional plans by the department, any completed plan must be submitted to the secretary of the department for approval no later than March 1 of each year. These regional plans shall include, but shall not be limited to, recommendations of appropriate funding mechanisms for implementing projects in the beach management plan, giving consideration to the use of single-county and multicounty taxing districts or other revenue generation measures by state and local governments and the private sector. Prior to presenting the plan to the secretary of the department, the department shall hold a public meeting in the areas for which the plan is prepared. The plan submission schedule shall be submitted to the secretary for approval. Any revisions to such schedule must be approved in like manner.

(2) Upon approval of the beach management plan, the secretary shall present to the President of the Senate, the Speaker of the House of Representatives, and the chairs of the legislative appropriations committees recommendations for funding of beach erosion control projects. Such recommendations shall be presented to such members of the Legislature in the priority order specified in the plan and established pursuant to criteria contained in s. 161.101(14).

(3) Once a project is determined to be undertaken, a survey of all or part of the shoreline within the jurisdiction of the local government in which the

beach is located shall be conducted in order to establish the area of beach to be protected by the project and locate an erosion control line. No provision of ss. 161.141-161.211 shall be construed as preventing a local government from participating in the funding of erosion control projects or surveys undertaken in accordance with the provisions of ss. 161.141-161.211. In lieu of conducting a survey, the board of trustees may accept and approve a survey as initiated, conducted, and submitted by the appropriate local government if said survey is made in conformity with the appropriate principles set forth in ss. 161.141-161.211.

(4) Upon completion of the survey depicting the area of the beach erosion control project and the proposed location of the erosion control line, the board of trustees shall give notice of the survey and the date on which the board of trustees will hold a public hearing for the purpose of receiving evidence on the merits of the proposed erosion control line and, if approval is granted, of locating and establishing such requested erosion control line. Such notice shall be by publication in a newspaper of general circulation published in the county or counties in which the proposed beach erosion control project shall be located not less than once a week for 3 consecutive weeks and by mailing copies of such notice by certified or registered mail to each riparian owner of record of upland property lying within 1,000 feet (radial distance) of the shoreline to be extended through construction of the proposed beach erosion control project, as his or her name and address appear upon the latest tax assessment roll, in order that any persons who have an interest in the location of such requested erosion control line

can be present at such hearing to submit their views concerning the precise location of the proposed erosion control line. Such notice shall be in addition to any notice requirement in chapter 120.

(5) The board of trustees shall approve or disapprove the erosion control line for a beach restoration project. In locating said line, the board of trustees shall be guided by the existing line of mean high water, bearing in mind the requirements of proper engineering in the beach restoration project, the extent to which erosion or avulsion has occurred, and the need to protect existing ownership of as much upland as is reasonably possible.

(6) In no event shall the department undertake a beach restoration or beach nourishment project where a local share is required without the approval of the local government or governments responsible for that local share.

(7) The department may adopt rules to administer this section.

§ **161.181, Florida Statutes**: Recording of resolution and survey of board of trustees.—If no review is taken within the time prescribed from the decision of the board of trustees or, if review be timely taken, in the absence of a final decision of a court of competent jurisdiction preventing the implementation of a beach erosion control project or invalidating, abolishing, or otherwise preventing the establishment and recordation of the erosion control line as provided herein, the board of trustees shall file in the public records of the county or counties in which the erosion control line lies, a copy of its

resolution approving the beach erosion control project and locating the erosion control line and shall also file and cause to be recorded in the book of plats of said county or counties a survey showing the area of beach to be protected and the location of the erosion control line.

§ 161.191, Florida Statutes: Vesting of title to lands.—

(1) Upon the filing of a copy of the board of trustees' resolution and the recording of the survey showing the location of the erosion control line and the area of beach to be protected as provided in s. 161.181, title to all lands seaward of the erosion control line shall be deemed to be vested in the state by right of its sovereignty, and title to all lands landward of such line shall be vested in the riparian upland owners whose lands either abut the erosion control line or would have abutted the line if it had been located directly on the line of mean high water on the date the board of trustees' survey was recorded.

(2) Once the erosion control line along any segment of the shoreline has been established in accordance with the provisions of ss. 161.141-161.211, the common law shall no longer operate to increase or decrease the proportions of any upland property lying landward of such line, either by accretion or erosion or by any other natural or artificial process, except as provided in s. 161.211(2) and (3). However, the state shall not extend, or permit to be extended through artificial means, that portion of the protected beach lying seaward of the erosion control line beyond the limits set forth in the survey

recorded by the board of trustees unless the state first obtains the written consent of all riparian upland owners whose view or access to the water's edge would be altered or impaired.

§ **161.201, Florida Statutes**: Preservation of common-law rights.—Any upland owner or lessee who by operation of ss. 161.141-161.211 ceases to be a holder of title to the mean high-water line shall, nonetheless, continue to be entitled to all common-law riparian rights except as otherwise provided in s. 161.191(2), including but not limited to rights of ingress, egress, view, boating, bathing, and fishing. In addition the state shall not allow any structure to be erected upon lands created, either naturally or artificially, seaward of any erosion control line fixed in accordance with the provisions of ss. 161.141-161.211, except such structures required for the prevention of erosion. Neither shall such use be permitted by the state as may be injurious to the person, business, or property of the upland owner or lessee; and the several municipalities, counties and special districts are authorized and directed to enforce this provision through the exercise of their respective police powers.

§ **161.211, Florida Statutes**: Cancellation of resolution for nonperformance by board of trustees.—

(1) If for any reason construction of the beach erosion control project authorized by the board of

trustees is not commenced within 2 years from the date of the recording of the board of trustees' survey, as provided in s. 161.181, or in the event construction is commenced but halted for a period exceeding 6 months from commencement, then, upon receipt of a written petition signed by those owners or lessees of a majority of the lineal feet of riparian property which either abuts or would have abutted the erosion control line if the same had been located at the line of mean high water on the date the board of trustees' survey was recorded, the board of trustees shall forthwith cause to be canceled and vacated of record the resolution authorizing the beach erosion control project and the survey locating the erosion control line, and the erosion control line shall be null and void and of no further force or effect.

(2) If the state, county, municipality, erosion control district, or other governmental agency charged with the responsibility of maintaining the protected beach fails to maintain the same and as a result thereof the shoreline gradually recedes to a point or points landward of the erosion control line as established herein, the provisions of s. 161.191(2) shall cease to be operative as to the affected upland.

(3) In the event a substantial portion of the shoreline encompassed within the erosion control project recedes landward of the erosion control line, the board of trustees, on its own initiative, may direct or request, or, upon receipt of a written petition signed by the owners or lessees of a majority of the lineal feet of riparian property lying within the erosion control project, shall direct or request, the agency charged with the responsibility of maintaining the beach to restore the same to the

extent provided for in the board of trustees' recorded survey. If the beach is not restored as directed or requested by the board of trustees within a period of 1 year from the date of the directive or request, the board of trustees shall forthwith cause to be canceled and vacated of record the resolution authorizing the beach erosion control project and the survey locating the erosion control line, and the erosion control line shall be null and void and of no further force or effect.

§ 253.141, Florida Statutes: Riparian rights defined; certain submerged bottoms subject to private ownership.—

(1) Riparian rights are those incident to land bordering upon navigable waters. They are rights of ingress, egress, boating, bathing, and fishing and such others as may be or have been defined by law. Such rights are not of a proprietary nature. They are rights inuring to the owner of the riparian land but are not owned by him or her. They are appurtenant to and are inseparable from the riparian land. The land to which the owner holds title must extend to the ordinary high watermark of the navigable water in order that riparian rights may attach. Conveyance of title to or lease of the riparian land entitles the grantee to the riparian rights running therewith whether or not mentioned in the deed or lease of the upland.

(2) Navigable waters in this state shall not be held to extend to any permanent or transient waters in the form of so-called lakes, ponds, swamps or overflowed lands, lying over and upon areas which have heretofore been conveyed to private individuals

by the United States or by the state without reservation of public rights in and to said waters.
(3) The submerged lands of any nonmeandered lake shall be deemed subject to private ownership where the Board of Trustees of the Internal Improvement Trust Fund of Florida conveyed the same more than 50 years ago without any deductions for water and without any reservation for public use and when taxes have been levied and collected on said submerged lands since conveyance by the state.
(4) Where private ownership of submerged bottoms outward from the shore has originated in a Spanish or other land grant approved by the Congress specifically describing an area in which was included navigable water, or by patent out of the United States prior to the date on which Florida became a state likewise containing a description including navigable water, or upon a valid conveyance out of the state, the submerged land included in such grant, patent, or conveyance shall be subject to taxes lawfully imposed.

IN THE SUPREME COURT OF FLORIDA

Case No. SC06-1449

On Appeal from the First District Court of Appeal
Lower Tribunal Case No. 1D05-4086

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, and THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND
Petitioners,

v.

STOP THE BEACH RENOURISHMENT, INC.,
Respondent.

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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INTRODUCTION

Pursuant to Rule 9.370 of the Florida Rules of Appellate Procedure, Pacific Legal Foundation (PLF) respectfully requests this Court's permission to submit this brief amicus curiae in support of Respondent Stop the Beach Renourishment, Inc. Respondent has consented to PLF's participation as Amicus in this case. Petitioners have not granted consent. Pursuant to Rule 9.370(a), a motion for this Court's leave to file accompanies this brief.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has offices in Sacramento, California; Bellevue, Washington; Honolulu, Hawaii; and Coral Gables, Florida. The Florida office, known as the Atlantic Center, is staffed full-time by two attorneys who are members of the Florida Bar.

As Amicus, PLF seeks to address the constitutional property rights protections at issue in this case. PLF respectfully submits that decisions of the United States Supreme Court, and of this Court, compel the conclusion that Petitioners' efforts result in government's physical taking of private property, and not a mere regulation of uses of property subject to balancing tests or authorized under a broad claim of police powers.

During the last thirty years, PLF attorneys have participated in the United States Supreme Court in virtually every case involving the rights of private property owners. In four of theses cases, PLF attorneys directly represented the persons whose rights to use their private property were unlawfully denied by government action. *See Rapanos v. United States*, 126 S. Ct. 2208 (2006) (limiting Clean Water Act jurisdiction to instances of substantial connection between wetlands and navigable waters); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2006) (that offending regulations pre-date owners' acquisition of property does not preclude takings claim); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997) (regulatory takings claim not rendered unripe merely because government offers transferable development rights to property owners); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (requiring casual nexus between burdens of land use regulations and putative harm regulations purport to address).

PLF attorneys also have participated in this Court on issues relating to private property rights. *See City of North Lauderdale v. SMM Properties, Inc.*, 825 So.2d 343 (Fla. 2002) (validity of special assessment for emergency medical services); *Orange County v. Costco Wholesale Corp.*, 823 So.2d 732 (Fla. 2002) (constitutional challenge to local zoning ordinance); *Martin County v. Yusem*, 690 So.2d 1288 (Fla. 1997) (standard of review required for comprehensive land use amendments).

Finally, PLF has participated in Florida cases dealing with specific issues relevant to this case. In

Brevard County v. Stack, 932 So.2d 1258 (Fla. 5th DCA 2006), PLF appeared as amicus curiae as the Fifth District Court of Appeals upheld the constitutionality of the Bert Harris Act against Claims that the Act's property rights protections wrongly limited government's police powers. And PLF attorneys currently are representing property owners in the Fifth District Court in *Trepanier v. Volusia County*, No. 5D05-3892, a case involving the rights of owners of beach property. The expertise gained by participating in this array of cases renders PLF attorneys particularly able to assist this Court in matters pertaining to the rights of private property owners, including the oceanfront owners in this case.

SUMMARY OF ARGUMENT

Petitioners' application of the Florida Beach and Shore Preservation Act (Act), Fla. Stat. § 161, Part I, effects the government's physical taking of private property requiring the payment of just compensation under the United States and Florida Constitutions. Amend. V, U.S. Const., Art. X, § 6. Contrary to the arguments of Petitioners and supporting Amici, the government's efforts under the Act do not constitute a mere regulation of the use of private property, but are an actual physical taking of lands and of riparian rights belonging to private owners. *Save Our Beaches, Inc., v. Florida Dep't of Envt'l. Protection*, 31 Fla. L. Weekly D1173, 2006 WL 1112700 at *10 (Fla. 1st DCA 2006). The United States Supreme Court and this Court have recognized physical occupations of the sort effected by Petitioners under the Act as "per se" or

"categorical" takings that mandate government payment of just compensation to the owners of the taken property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1983); *Storer Cable TV of Florida, Inc. v. Summerwinds Apartments Assoc.*, 493 So.2d 417, 419 (Fla. 1986).

The constitutional guarantees of security in property, and the judicial opinions interpreting them, serve as fundamental limits upon—and are not subordinate to—broad government assertions of the police power. These fundamental limitations on government authority are designed to constrain claims of unfettered plenary powers. Moreover, courts consistently have rejected governmental complaints that compliance with constitutional mandates is too expensive. This Court should affirm the decision of the lower court.

ARGUMENT

I

PETITIONERS' APPLICATION OF THE ACT EFFECTS TAKINGS OF PRIVATE PROPERTY REQUIRING PAYMENT OF JUST COMPENSATION

A. Petitioners' Actions Are a Physical Taking of Private Property and of Appurtenant Riparian Rights

The key feature of Petitioners' projects is the establishment of an erosion control line. *Save Our Beaches, Inc.*, 31 Fla. L. Weekly D1173, 2006 WL 1112700 at *3. This line, set by Petitioner Board of Trustees to track the then-current mean high water line, becomes the permanent boundary of demarcation between private properties and the beach land that will be restored and, ultimately, will become the property of the state. *Id.* "Significantly, [ ]the erosion control line becomes the new property boundary, denying the upland landowners any property gained by accretion." *Id* at *4 (citing Fla. Stat. § 161.191). The seaward property becomes the state's not just theoretically or practically; under the Act, the state assumes legal, record title to the property. 2006 WL 111270 at *4. As the First District Court held, Petitioners' establishment of the erosion control line thus results in the elimination of property boundaries and the deprivation of property rights, and of physical property itself, by virtual fiat. *Id.*

This Court consistently has recognized that the right to accretion is a fundamental right of the owners of property abutting the ocean. *See Bd. Of Trs. of the Internal Improvement Trust Fund v. Sand Key Assocs., Ltd.*, 512 So.2d 934, 936 (Fla. 1987); *Belvedere Dev. Corp. v. Dep't of Transp.*, 476 So.2d 649, 651 (Fla. 1985). As implicated by its name, the mean high water line is not forever static, but is a boundary between public and private lands that moves as the tides naturally change over time. *Save our Beaches, Inc.*, 31 Fla. L. Weekly D1173, 2006 WL 1112700 at *8-9.

It is well-settled in Florida that if the mean high waterline moves seaward, owners of property abutting the ocean are entitled to the widened, or accreted, beach. *Belvedere*, 476 So.2d at 651; *Save Our Beaches, Inc.*, 31 Fla L. Weekly D 1173, 2006 WL 1112700 at *10. This rule long has governed other coastal jurisdictions as well. *See e.g., State by Kobayashi v. Zimring*, 566 P.2d 725 (Wash. 1977); *State v. Gill*, 66 So.2d 141, 142 (Ala. 1953); Giraud's *Lessee v. Hughes*, 1 G. & J. 249, 1829 WL 1000 at *4 (Md. 1829). It also is the rule applied by courts, including the United States Supreme Court, construing federal law. *Hughes v. Washington*, 389 U.S. 290, 292-93 (1967).

Petitioners' application of the Act operates to permanently deprive riparian owners—owners of property running to the mean high water mark—of any possibility of accreted beach land. Decisions of the U.S. Supreme Court and of this Court long have held that such a deprivation necessarily results

in a physical taking of private property requiring the payment of just compensation to the property's owners:

> "A long and unbroken line of decisions of this Court establishes that the grantee of land bounded by a body of navigable water acquires a right to any natural and gradual accretion formed along the short." . . . Both Federal and Florida courts have held that an owner of land bounded by the ordinary high water mark of navigable water is vested with certain riparian rights, including the right to title to such additional abutting soil or land which may be gradually formed or uncovered by the processes of accretion or relication, which right cannot betaken by the State without payment of just compensation.

State v. Florida Nat. Properties, Inc., 338 So.2d 13, 17 (Fla. 1976) (quoting *Hughes v. Washington*, 389 U.S. at 293) (citations omitted). In *Florida Natural Properties*, this Court went on to promulgate a holding with an even more specific application to the instant case, in light of the importance of Petitioners' establishment of erosion control lines:

> [R]equiring the *establishment of a fixed boundary line* between the sovereignty bottom lands and Plaintiff's riparian lands [ ] constitutes a taking of Plaintiff's property, including its

> riparian rights to future alluvion or accretion . . . .

338 So.2d at 17 (emphasis added); *see Sandy Key Assocs., Ltd.*, 512 So.2d at 936, 945-46.

Compounding the constitutional violation, once Petitioners freeze the boundary between private and sovereign lands by setting an erosion control line, they then proceed to fill the seaward side of this line with sand. *Save Our Beaches, Inc.*, 31 Fla. L. Weekly D1173, 2006 WL 1112700 at *1. This has the effect of widening the "sovereign" portion of the beach between the erosion control line and the water. *Id.* This introduces a strip of state-owned property between private property and the water, severing the owners' properties from the sea and instantly turning oceanfront property into something less. Such severance has a significant and detrimental impact on the property owners, for riparian owners are entitled to certain rights no afforded owners of inland property, in addition to the aforementioned right to accretion. *See Sand Key Assocs., Ltd.*, 512 So.2d at 936.

Among these riparian rights are the right of access to the water, the right to use the water for navigational purposes, and the right to an unobstructed view of the water. *Id.* Another is the basic right not to have these other rights eliminated by virtue of having the property removed from contact with the water. *Id.* Following precedent established by the U.S. Supreme Court, this Court has held plainly that these riparian rights are property rights that "may not be taken without just

compensation and due process of law." *Id.* (citations omitted). Each of these rights indeed is taken by Petitioners pursuant to the Act without just compensation, contravening the federal and state Constitutions and the judicial opinions interpreting them.

B. Petitioners' Actions Are Not a Regulation of a Use of Private Property, but a Physical Occupation Requiring Payment of Just Compensation

Despite the facts and controlling authorities discussed above, Petitioners and Amici argue that the doctrine of regulatory takings governs this case. *See* Petitioners' Amended Initial Brief (Petitioners' Brief) at 34-43. This argument fails, however, for the takings doctrines of the Unites States Supreme Court and of this Court have distinguished between regulatory takings and the type of physical invasion and occupation of property, requiring compensation, resulting from Petitioners' actions under the Act.

"The concept of regulatory takings reflects the common sense observation that governments should not be allowed to escape the duty to compensate simply through the legalistic trick of co-opting the use of land without seizing the actual title to the land." Steven Geoffrey Giesler, *et al.*, *Measure 37: Paying People for What We Take*, 36 Envtl. L. 79, 81 (2006). The united States Supreme Court has recognized several categories of regulatory takings. *See Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 535-540 (2005). In *Lucas v. Southern Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court held that

where a government regulation "denies all economically beneficial or productive use of land," it constitutes a taking. *Lucas*, 505 U.S. at 1015. In *Penn Central Transportation Company v. New York City*, 438 U.S. 104 (1978), the

Court established a multi-pronged, ad hoc takings test for regulations that infringe on an owner's use of his property, but fall short of a *Lucas*-style restriction.

This kind of regulatory taking, based on the restricted use of property typically effected by a zoning ordinance, is what Petitioners argue is at issue in this case. *See* Petitioners' Brief at 34-35. But Petitioners' projects under the Act do not regulate the *use* of private property; they constitute an actual physical occupation and taking of property itself. For Petitioners to argue that their actions are a regulation of private property, they necessarily must claim that the accreted property seaward of the erosion control line remains under private control; any other assertion is a concession that title has changed hands, which would require the payment of just compensation. *See* Part I(A), *supra*.

This line of reasoning, then, must recognize that a litany of government or government-endorsed activities, including the operation of heavy machinery, the physical placement of sand that is the end purpose of beach renourishment, and the ingress and egress of the public on the newly-restored beach, *see Save Our Beaches, Inc.*, 31 Fla. L. Weekly D1173, 2006 WL 1112700 at *1, 8, is occurring on property in which the riparian owners

have a vested interest. *Sand Key Assocs., Ltd.*, 512 So. 2d at 936. In *Sand Key*, this Court held that upland owners maintained a vested property right to future accretions. *Id.* Petitioners' restoration projects result in the physical placement of sand, and the subsequent traversing of the public on the property that is the subject of this vested right, forever foreclosing the potential for the owners to benefit from accretion and their vested right. *Save Our Beaches, Inc.*, 31 Fla. L. Weekly D1173, 2006 WL 1112700 at *6.

It is unsurprising then that Petitioners argue for the Penn Central regulatory takings factors to govern, for there is no doubt under controlling takings law that where the government effects the physical occupation of property belonging to a private party, a taking requirement just compensation has occurred. The United States Supreme Court case that controls physical government occupations of private property is *Loretto*:

> [A] permanent physical occupation of property is a taking. In such a case, the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation.

458 U.S. at 441. In last year's *Lingle* opinion, the Court reaffirmed its adherence to *Loretto* and to the rule that physical government occupations of private property are "per se," or "categorical," takings.

Lingle, 544 U.S. 537. Numerous Florida courts, including this Court, have relied on *Loretto's* rule. It is the law in Florida. *See Storer Cable TV of Florida, Inc. v. Summerwinds Apartments Assoc.*, 493 So.2d at 419; *Certain Interested Underwriters v. City of St. Petersburg*, 864 So.2d 1145, 1147-48 (Fla. 2d DCA 2003).

At issue in *Loretto* was the placement of cable wire across the rooftop of an apartment building in Manhattan. That the wires took up limited physical space was of no importance to the Court's taking analysis:

> [C]ases, relying on the character of a physical occupation, clearly establish that permanent occupations of land by such installations as telegraph and telephone lines, rails, and underground pipes or wires are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land.

458 U.S. at 430. In this regard *Loretto* applies to Petitioners' efforts, for more egregious still is the instant situation where tons of sand are located permanently on property upon which—in the absence of Petitioners' actions the upland owners would have a "vested" property interest in, and right to, future accretions. *Save our Beaches, Inc.*, 31 Fla. L. Weekly D1173, 2006 WL 1112700 at *7 (citing *Sand Key Assocs., Ltd.*, 512 So.2d 934, 936. This is done without the acquiescence of those properties'

owners, and without the payment of just compensation.

The *Loretto* Court explained the reason for its holding, rooted in the basic legal and philosophical concepts of what it means to own property:

> The historical rule that a permanent physical occupation of another's property is a taking has more than tradition to commend it. Such an appropriation is perhaps the most serious form of invasion of an owner's property interests. To borrow a metaphor, the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand. Property rights in a physical thing have been described as the rights to 'possess, use and dispose of it.' To the extent that the government permanently occupies physical property, it effectively destroys each of these rights.

458 U.S. at 435 (internal citations omitted). The *Loretto* Court further distinguished between the effects of a *per se* physical occupation taking and a taking based on a restriction on land use of the sort argued for by Petitioners:

> [A]n owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property . . . .

> [S]uch an occupation is qualitatively more severe than a regulation of the use of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion.

Id. At 436. Such a "special kind of injury" is precisely what is suffered by private property owners affected by Petitioners' application of the Act. After Petitioners establish the ECL, upland owners retain absolutely no control over the property in which they would, if not for Petitioners' actions, maintain a vested property right. This land becomes the property of the government. *See* Part I(A), *supra*.

The motive and purpose for the physical occupation are irrelevant. "[A] permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve. Our constitutional history confirms the rule, recent cases do not question it, and the purposes of the Takings Clause compel its retention." *Loretto*, 458 U.S. at 426. Thus is refuted the argument that this Court should overlook the United States Supreme Court's precedent, and the protections guaranteed property owners in the federal and state Constitutions, in order to further

The stat's tourism interests, *see* Brief Filed in Support of the Petitioners' Initial Brief (Convention Brief) at 2, 7-9, or for any other reason. *See* Part II, *infra*.

II

CONSTITUTIONALLY-GUARANTEED PRIVATE PROPERTY RIGHTS MUST NOT BE SUBORDINATED TO GOVERNMENT ASSERTIONS OF POLICE POWERS

The right to own and be secure in one's property is one of the essential freedoms deserving of the utmost judicial protection. The Florida Constitution recognizes this guaranteed right in no fewer than three places. Article I, Section 2, which enumerates Basic Rights, declares:

> All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess, and protect property.

In order to ensure that the rule of law governs the abrogation of this Basic Right, Article I, Section 9, requires that

> No person shall be deprived of life, liberty, or property without due process of law . . . .

Article 10, Section 6, establishes concrete limitations on the government's power to take private property:

> No private property shall be taken except for a public purpose and with full

> compensation thereof paid to each owner . . . .

This multifaceted protection of Floridians' property rights reflects the agreement of the state constitution's drafters with the Founders of the federal Republic. The chief author of the Constitution, James Madison, recognized the paramount importance of property rights when he wrote in 1792 that

> [g]overnment is instituted to protect property of every sort; as well as which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his.

James Madison, *Property*, Mar. 29, 1792, reprinted in *The Papers of James Madison* (William T. Hutchison, et al., eds., Univ. of Chicago Press 1962). This Court has echoed Madison's words, referring, for example, to the "sacred" nature of property rights. *Corn v. State*, 332 So.2d 4, 7 (Fla. 1976).

Yet Petitioners and supporting Amici would subordinate these constitutional protections, and their philosophical underpinnings, to government claims of "police powers." Amicus Florida Association of Convention & Visitors, Inc., (Convention Brief), summarizes its argument on this point by relegating constitutional property protections to inferior status, claiming that

Petitioners' application of the Act "falls squarely within the police power of the state to regulate private property rights for the good of the whole and for the protection of Florida's beaches, as well as, [sic] the Tourism industry." Convention Brief at 3.[1] According to this theory it is this police power that is predominant, with the provisions of the united States and Florida Constitutions—and the decisions of the United States and Florida Supreme Courts—left but to fill in the gaps the police power leaves empty. To the contrary, these constitutional provisions and the judicial decisions interpreting them have as their fundamental purpose the limitation of the government's police power.

Few doctrines are as ambiguous or as ripe for government overreaching as that of the "police power." *See, e.g.*, Walter Wheeler Cook, *What is the Police Power*, 7 Colum. L. Rev. 322, 322 (1907) ("No phrase is more frequently used and at the same time less understood than the one which forms the subject of the present discussion."); *see also* Collins Denny, Jr., *The Growth and Development of the Police Power of the State*, 20 Mich. L. Rev. 173, 173 (1921) ("The police power of the state is one of the most difficult phases of our law to understand, and it is even more difficult to define it and place it within any bounds.").

The police power originally was understood to permit government to intercede only when the abuse of a citizen's rights directly affected the welfare of the

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[1] Amicus's invocation of the mere "regulat[ion] of property rights is at odds with the facts of this case as found by the appeals court, and case law governing government's physical invasion of private property. *See* Part I, *supra*.

general public. Regulations restricting individual rights in its name were to be narrowly tailored, used only to enforce the boundaries between individuals' fundamental rights. *See Pennsylvania Coal co. v. Majon*, 260 U.S. 393, 415 (1922). From America's founding, government's police power has been valid only insofar as it was derived "from the consent of the governed." Declaration of Independence, 1 Stat. 1 (1776). As Alexander Hamilton explained in Federalist No. 78, a Legislature's authority is subordinate to, and derivative of, the sovereignty of the people. *See* The Federalist No. 78, at 467-69 (Clinton Rossiter ed., 1961). And, because the people give government its powers, the people continue to retain the authority to set limits on how those powers may be exercised.

The most fundamental way the people set these limits is by ratifying the documents that form the supreme laws of their jurisdictions: their federal and state Constitutions. *See* art. VI, cl.2, U.. CONST. These are the guidelines within which the police power must operate, and not the other way around. None would dispute government's general power to regulate in the interests of the public's safety and welfare. But government's exercise of the police power is valid only to the extent it does not violate "applicable provisions of the federal and state Constitutions designed to protect private rights from arbitrary and oppressive government action." *Everglades Sugar & Land Co. v. Bryan*, 87 So. 68, 77 (Fla. 1921). Such constitutional protections do not shift with the winds of the day, nor according to the whims of government officials. The security and certainty they afford the citizens who

ratified them form the backbone of our rule of law. And by their plain language and through their interpretation by the United States Supreme Court and this Court, they require compensation for takings of property of the sort effected by Petitioners under the Act. *See* Part I, *supra*.

As this Court has held in a variety of contexts, and on several occasions, "It is fundamental and elementary that the legislature may not do that by indirect action which it is prohibited by the Constitution to do by direct action." *See, e.g., Lewis v. The Florida Bar*, 372 So.2d 1121, 1122 (Fla. 1979) (Quoting *State ex rel. Powell v. Leon County*, 182 Sol. 639, 642 (Fla. 1938)). Applied to the instant case. This principle renders it improper for Petitioners to rely on the police power to physically take (or even to physically invade and take via "regulation") private property without paying full compensation, when a formal eminent domain action seeking to so avoid compensation clearly and expressly would be prohibited by the federal and state Constitutions.

In its brief, Amicus Florida Shore & Beach Preservation Association puts forth an argument that is a cousin to the "police power supremacy" claim. The Association argues that since it would be too expensive for governments to pay compensation for Property they take under the Act, this Court should not require the payments in the first place. Brief of Florida Shore & Beach Preservation Association at 2. This principle would prove a disaster if held to apply to constitutional rights. Constitutional requirements often are expensive, but failure to enforce these guarantees due to

administrative burden or cost to government is not a valid excuse. *See Watson v. City of Memphis*, 373 U.S. 526, 537-38 (1963) (rejecting the argument that financial constraints justified failure to desegregate city parks); *see also* Stephen Holmes and Cass R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* 52 (1999) (explaining that "[u]nder the First Amendment's protection of freedom of speech, states must keep streets and parks open for expressive activity, even though it is expensive to do this, and to do it requires an affirmative act.").

Government no more can ignore the Constitution's Just Compensation Clause in the name of saving money than it can house peacetime soldiers in private homes to save the money necessary to build barracks, Amend. III, U.S. Const. Nor would Amicus's rule be any more valid than a government eschewing search warrants so as to avoid police administration costs. *Rush v. Obledo*, 517 F. Supp. 905, 916 n.16 (N.D. Cal. 1981) (rejecting a city's argument that the cost of surveillance justified warrantless inspections, holding that "neither administrative convenience nor budgetary constraints justify governmental deprivation of fundamental constitutional rights."). Even if true, that the government cannot afford to pay when it takes private property is a good argument for governmental restrain and respect for property rights, not for seeking to avoid constitutional responsibilities. *See* Gieseler, *et al.*, 36 Envtl. L. 79, 86-86, 100 (addressing similar "cost" arguments, in the context of Oregon's land use reform initiative).

CONCLUSION

Petitioners' application of the Act effects takings of private property requiring the payment of just compensation pursuant to the United States and Florida Constitutions. For the reasons set forth above, the Court should affirm the lower court's decision.

DATED: December 5, 2006.

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IN THE SUPREME COURT OF FLORIDA

SC-06-1447
First DCA Case No.: 1D05-4086

CITY OF DESTIN and WALTON COUNTY,
Petitioners,

vs.

STOP THE BEACH RENOURISHMENT, INC.,
Respondent.

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL
TALLAHASSEE, FLORIDA

AMICUS BRIEF OF FLORIDA HOME BUILDERS ASSOCIATION IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST

Amicus Curiae, Florida Home Builders Association (FHBA), is a nonprofit association composed of individuals and companies who own property and/or are engaged in construction and property sales throughout Florida. As a party to the seminal case of *Florida Home Builders Ass'n v. Department of Labor,* 412 So.2d 351 (Fla. 1982), FHBA is vitally interested in the requirements for an association to have standing to participate in government decision-making that impacts its more than 20,000 members. FHBA has been granted leave to submit amicus curiae briefs in numerous other appeals before this Court involving property issues. *See e.g., Sunset Harbour North Condo. Ass'n v. Robbins*, 914 So.2d 925 (Fla. 2005).

FHBA members have a special interest in this Court's review of the decision below. If the decision below is reversed, FHBA could lose the expanded "public access to the activities of governmental agencies" for which the associational standing test was created. *Florida Home Builders,* 412 So.2d at 352-353. FHBA routinely serves as the vehicle through which its members exercise their public access rights to challenge allegedly impermissible governmental actions. It does so in circuit courts, appellate courts and more frequently before the Division of Administrative Hearings where it has participated in over 25 cases since 1986.

FHBA members also regularly own, develop, and sell waterfront (*i.e.*, riparian) property throughout the State. The outcome in this case

could create title problems or render title to these riparian properties unmarketable. Accordingly, FHBA will offer a unique perspective on the implications of the lower court's holding for associations that rely upon associational standing, and for landowners throughout Florida who engage in the development and sale of waterfront property like that involved in this appeal.

SUMMARY OF ARGUMENT

The *Florida Home Builders* associational standing test is one that a court must apply on a case-by-case basis irrespective of the characterization of a challenge to governmental decision-making. Whether the challenge could be labeled as constitutional, statutory, facial, as-applied, etc. is irrelevant. If the challenge brought by an association meets the three-prong test of *Florida Home Builders,* which was adopted in recognition of the legislature's intent to expand public access to the activities of agencies, then the association has standing.

Here, the Board of Trustees of the Internal Improvement Trust Fund (Trustees), through the recording of two Erosion Control Line (ECL) surveys in Walton and Okaloosa County, unilaterally changed the property boundaries of 453 riparian properties. This impermissible change of property boundaries jeopardizes the marketability of numerous titles because the ECL surveys are recorded outside of the chain of title of the 453 properties. Ignoring the fact that the establishment of the ECLs results in a taking of riparian rights, an issue addressed by the

parties and other amici, the Trustees have further jeopardized the marketability of these titles by asserting ownership to any newly-created beach seaward of the ECLs.

ARGUMENT

I. An Association Has Standing To Bring Any Action That Meets the Three-Prong Test of This Court's *Florida Home Builders* Test

The Petitioners in this case attempt to artificially limit the doctrine of associational standing as announced by this Court in *Florida Home Builders*. FHBA, a party to this seminal case, urges the Court to reject any argument that would so limit the holding of *Florida Home Builders*.

This Court, in initially establishing the associational standing test in *Florida Home Builders*, was cognizant of the legislature's intent to "broaden public access to the . . . activities of agencies." *Florida Home Builders*, 412 So.2d at 353 n. 2. As this Court recognized: "[e]xpansion of public access to the activities of governmental agencies was one of the major legislative purposes of the new Administrative Procedure Act." *Id.* at 352-353.

With this broadening of access to agencies' activities in mind, the three-prong associational standing test of *Florida Home Builders* was formulated. To show standing, an association:

> "[1] must demonstrate that a substantial number of its members, although not necessarily a majority, are 'substantially affected' by the challenged rule. Further, [2] the subject matter of the rule must be within the association's general scope of interest and activity, and [3] **the relief requested must be of the type appropriate for a trade association to receive on behalf of its members.**"

Florida Home Builders, 412 So.2d at 353-354 (emphasis added).

The dispute over standing in the instant case involves the third prong of this test: the appropriateness of the relief requested. Thus, any analysis of standing must begin with a review of the relief sought by Respondent, Stop the Beach Renourishment, Inc. (STBR). STBR argued that the Petitioners' actions in issuing the Joint Coastal Permit (JCP) and establishing the ECL did not comply with Part I of the Beach and Shore Preservation Act, Chapter 161, Fla. Stat., (Act) and should be invalidated. The First District Court of Appeal agreed and invalidated the entire JCP and the ECL with respect to the property of STBR's members. *Save Our Beaches, Inc. v. Florida Dep't of Envt'l Protection*, 31 Fla. L. Weekly D1173, D1177 (Fla. 1st DCA 2006).

This type of relief is exactly the kind of relief contemplated by *Florida Home Builders* because it applies broadly and identically to all affected persons.

Petitioners ignore the type of relief STBR seeks and choose to focus instead on labeling STBR's challenge as an "as-applied regulatory taking" that cannot be brought by an association.[1] However, any artificial label or categorization of any claim is irrelevant when determining whether an association has standing to challenge unlawful governmental action. That determination can and must be made instead by looking at the specific challenge to assess whether it meets the three-prong test of *Florida Home Builders*.

In discussing the propriety of the relief requested in *Florida Home Builders*, this Court specifically noted that the issue in that case was the validity of agency action and not "association or individual claims for money damages." *Florida Home Builders*, 412 So.2d at 354. In the instant case, STBR is seeking to invalidate the Petitioners' agency action asserting that the JCP and ECL were issued and recorded, respectively, in violation of the Act. This relief is clearly the appropriate type of relief an association may obtain on behalf of its members. Conversely, the participation of individual members of STBR would be required if it were seeking money

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[1] It should be noted that STBR has not brought an as-applied regulatory taking claim. Rather, STBR has challenged the Petitioners' agency action, which does not comply with the Act's requirements resulting in unconstitutional agency action.

damages for itself or its members, as in the "takings" cases cited by the Petitioners.

It also should be noted that this Court has expressly approved constitutional challenges brought by associations on behalf of their members.

In *Florida Ass'n of Counties, Inc. v. Department of Admin.*, 595 So.2d 42 (Fla. 1992), this Court expressly adopted the opinion of the Fourth District Court of Appeal which found two associations (both amici in this case) had standing to challenge the constitutionality of Chapter 88-238, Laws of Florida. The district court held:

> Here, a substantial number of the constituents comprising the [Florida] Association [of Counties] and [Florida] League [of Cities] have been substantially and adversely affected by Chapter 88-238, in that they have increased their FRS contributions. There is no **requirement that those entities themselves must sustain special injury.**

Florida Ass'n of Counties, Inc. v. Department of Admin., 580 So.2d 641, 646 (Fla. 1st DCA 1991) (emphasis added); *accord City of Lynn Haven v. Bay*

County Council of Registered Architects, Inc. 528 So.2d 1244, 1246 (Fla. 1st DCA 1988).

The court in *Hillsborough County v. Florida Restaurant Ass'n, Inc.*, 603 So.2d 587 (Fla. 2d DCA 1992) relying on *Florida Ass'n of Counties, Inc.*, reiterated that associational standing was proper to challenge an unconstitutional act of a governmental entity:

> We agree with the trial court on this threshold issue and find that the Association has standing to contest the validity of the ordinance. That is so because the Association has met the three-prong test which confers standing to an association to sue for the benefit of its members who are more directly affected by the governmental action than the association itself.

Id. at 589 (citing the *Florida Home Builders* three-prong test for standing).

In *Hillsborough County*, as in the instant case, all members of the restaurant association were affected in the exact same manner (*i.e.*, each one of them was required by county ordinance to post a health warning sign). The association members did not seek money damages but, as STBR here, sought

invalidation of the allegedly illegal and unconstitutional government action.

As this Court recognized in *Florida Home Builders*, there are cases where the costs of instituting and maintaining a challenge to a governmental action may be prohibitive for individual association members, and needlessly tax the resources of the tribunal to dispose of multiple challenges based upon identical or similar allegations of unlawful agency action. *Florida Home Builders* at 353. Certainly, agency action which does not comply with a statute's requirements, resulting in an unconstitutional agency action, and which stands not only to broadly affect an association's individual members but also to establish broadly applicable agency policy, is agency action that an association has standing to challenge on behalf of its members. Thus, FHBA urges this Court to affirm the holding of the District Court as it properly determined that STBR had associational standing.

II. The Trustees' Attempt to Claim Title to any Newly-Created Beach Based on an Illegal ECL Will Jeopardize the Marketability of Riparian Property Titles Statewide.

In the case of this nourishment project, the Trustees, through application of the Act, attempt to modify 453 deeds by the simple recording of two ECL surveys in Walton and Okaloosa Counties. [T. 133, 142]. It is noteworthy that the Trustees have not recorded any document within the chain of title to each of these properties to put the owner or any subsequent

purchaser on notice of the modification to the deed by the ECL survey. Numerous property owners believe that the Mean High Water Line (MHWL) is their property boundary as indicated by their deeds and any future conveyance of that property likely would include the current legal description in the future deed. A subsequent purchaser's title search would not reveal the ECL survey as the Trustees do not place any notice in the chain of title.[2]

In this case, the Trustees – for the first time on appeal – have asserted that they own title to any newly-created beach seaward of the ECL through the common law doctrine of avulsion in addition to provisions of the Act. FHBA agrees with STBR that any ownership issues are premature since no factual record was created (or could have been created)[3] relating to ownership. To the extent the Court considers such arguments, it should be aware of the impacts that any decision on this issue could have on the marketability of titles.

The Trustees' assertions of ownership will subject numerous riparian titles around the state to

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[2] Other Amici point out that the Act requires the Trustees to inform riparian property owners (and hold a public hearing) prior to the setting of the ECL. ' 161.161, Fla. Stat. These Amici, however, fail to note that a riparian owner cannot opt out of a nourishment project. In practice, the Trustees force all riparian property owners to submit to having an ECL change their property line. Because riparian property owners cannot opt out of a project, any public hearing is meaningless.

[3] Section 26.012(2)(g), Fla. Stat., provides that the circuit courts have "exclusive original jurisdiction . . . in all actions *involving the title and boundaries of real property.*"

uncertainty. This situation could have easily been avoided had the Trustees merely complied with Section 161.141, Fla. Stat., which requires the applicant for a beach nourishment project to use eminent domain to condemn the property rights needed for the nourishment project (*i.e.*, a strip of riparian land).

Such a haphazard change of property boundaries jeopardizes the marketability of numerous titles around the state where ECLs have been recorded (or may be in the future) outside the chain of title. It further subjects each property owner to a suit with the Trustees to quiet title. The Second District Court of Appeal has expressed the same concerns in a case where the Trustees attempted to strip a riparian owner of its right to accreted lands where the riparian owner did not cause the accretions. *Board of Trustees of the Internal Improvement Trust Fund v. Medeira Beach Nominee, Inc.*, 272 So.2d 209 (Fla. 2d DCA 1973). Therein, the court stated: "Were the state to gain title to this accreted land we believe that riparian titles around the state would be in jeopardy of unmarketability." *Id.* at 213.

The State's passage and implementation of the Act is no doubt well-intentioned. These intentions, no matter how honorable, however, do not justify the creation of a situation that will render hundreds of property titles unmarketable, and simultaneously create a precedent for repeating this unlawful action throughout the State, simply because the Trustees failed to comply with the requirements of the Act.

CONCLUSION

FHBA requests this Court to expressly uphold the decision below finding that STBR has associational standing under the *Florida Home Builders* associational standing test to raise claims on behalf of its members seeking to invalidate an agency action. FHBA further urges this Court to affirm the decision below because doing otherwise would impair the marketability to riparian titles statewide.

Respectfully submitted,

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Petitions for Certiorari Seeking Review of "Judicial" Takings

Petition for Writ of Certiorari, *T H Investments, Inc. v. Kirby Inland Marine, LP*, No. 08-270 (U.S. filed Aug. 28, 2008), *cert denied*, -- U.S. --, 2009 WL 56207 (Jan. 12, 2009) (mem).

Petition for Writ of Certiorari, *Boise Cascade Corp. v. Oregon*, No. 07-1612 (U.S. filed Jun 24, 2008), *cert denied*, -- U.S. --, 2008 WL 2555342 (Oct. 6, 2008) (mem).

Petition for Writ of Certiorari, *Goeckel v. Glass*, No. 05-764 (U.S. filed Dec. 12, 2005), *cert denied*, 546 U.S. 1174 (Feb. 21, 2006) (mem).

Petition for Writ of Certiorari, *Marine Forests Society v. California Coastal Commission*, No. 05-373 (U.S. filed Sept. 20, 2005), *cert denied*, 546 U.S. 979 (Oct. 31, 2005) (mem).

Petition for a Writ of Certiorari, *McQueen v. South Carolina Department of Health and Environmental Control*, No. 03-159 (U.S. filed July 30, 2003), *cert denied*, 540 U.S. 982 (Nov. 3, 2003) (mem).

Petition for Writ of Certiorari, *Echevarrieta v. City of Rancho Palos Verdes*, No. 01-2 (U.S. filed June 19, 2001), *cert denied*, 534 U.S. 950 (Oct. 9, 2001) (mem).

Petition for Writ of Certiorari, *Phelps Dodge Corp. v. U.S.*, No. 00-1464 (U.S. filed Mar. 19, 2001), *cert denied*, 533 U.S. 941 (June 25, 2001) (mem).

Petition for Writ of Certiorari, *Chevy Chase Land Co. v. U.S.*, No. 00-31 (U.S. filed July 3, 2000), *cert denied*, 531 U.S. 957 (Oct. 30, 2000) (mem).

Petition for a Writ of Certiorari, *Nansay Hawaii, Inc. v. Public Access Shoreline Hawaii*, No. 95-1159 (U.S. filed Jan. 18, 1996), *cert denied*, 517 U.S. 1163 (Apr. 22, 1996) (mem).

Petition for Writ or Certiorari, *Eldridge v. Ezell*, No. 92-321 (U.S. filed Aug. 17, 1992), *cert denied*, 506 U.S. 918 (Oct. 13, 1992) (mem).

Petition for Writ of Certiorari, *Gore v. Louisiana*, No. 91-147 (U.S. filed July 22, 1991), *cert denied*, 502 U.S. 863 (Oct. 7, 1991) (mem).

Petition for Certiorari, *Crion Corp. v. Washington*, No. 87-1575 (U.S. filed M r. 16, 1988), *cert denied*, 486 U.S. 1022 (Ma 23, 1988) (mem).

Petition for Writ or Certiorari, *Tahoe Shorezone Representation v. California*, No. 86-1901 (U.S. filed May 29, 1987), *cert denied*, 484 U.S. 821 (Oct. 5, 1987) (mem).

Petition for Writ or Certiorari, *Fogerty v. California*, No. 86-1877 (U.S. filed May 23, 1987), *cert denied*, 484 U.S. 821 (Oct. 5, 1987) (mem).

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
APR 30 2009
OFFICE OF THE CLERK

No. 08-1151

In the Supreme Court of the United States

STOP THE BEACH RENOURISHMENT, INC.,
Petitioner,
v.
FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND, WALTON COUNTY, AND CITY OF DESTIN,
Respondents.

On Petition for Writ of Certiorari to the Florida Supreme Court

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QUESTION PRESENTED

Does the Florida Supreme Court's opinion upholding the state's Beach and Shore Preservation Act – which authorizes publicly-funded beach restoration projects solely in critically eroded areas, carefully balances public and private interests, maintains existing ownership of all upland property, and preserves all relevant common law littoral rights in protecting private property and carrying out the State's responsibility to manage and protect its beaches – constitute a "judicial taking" under the Fifth and Fourteenth Amendments of the United States Constitution?

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MISCELLANEOUS

2 W. Blackstone, Commentaries 12-13

E. Gressman, K. Geller, et al., *Supreme Court Practice* (9th ed. 2007) 9-10

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Florida Supreme Court, *Walton County v. Stop the Beach Renourishment, Inc.*, is reproduced in the Petitioner's Appendix ("Pet. App.") at App. 1 and is reported at 998 So. 2d 1102 (Fla. 2008).

JURISDICTION

The Florida Supreme Court entered its judgment on September 29, 2008 and denied rehearing on December 18, 2008. *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102 (Fla. 2008). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (2000).

STATEMENT

The central issue in this case is whether Florida's Beach and Shore Preservation Act ("Act") constitutes an unconstitutional taking of the littoral right of potential future[1] accretion[2] from owners of beachfront property

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[1] This case does not involve state taking or regulation of *existing* accreted lands. *See Hughes v. Washington*, 389 U.S. 290 (1967) (involving ownership of existing accreted lands along beachfront property).

[2] Under the common law, beachfront owners possess the right to future gradual and imperceptible accretions of land due to naturally-occurring changes to the shore; (Continued ...)

that requires compensation. More than forty years ago, Florida's Legislature enacted the Act, chapter 161, Florida Statutes, under its state constitutional duty to protect the state's beaches, which are held in trust for the people. Art. X, § 11, Fla. Const. The Act, which applies only to critically eroded beaches, allows the state to restore storm-ravaged shorelines by placing sand on sovereign submerged lands.[3] This provides a substantial benefit to both the public and to private upland owners who retain all littoral rights of access, use, view, ingress/egress, boating, bathing, fishing, and so on (excepting only speculative future accretions).

As the Florida Supreme Court held below, the Act carefully balances the public interest in restoring critically eroded shorelines with the interests of private upland owners. The public interest is served because the addition of sand to eroded sovereignty lands "prevents further loss of public beaches, protects existing structures, and repairs prior damage. In doing so, the Act promotes the public's economic, ecological, recreational, and aesthetic interests in the shoreline." *Walton County*, 998 So. 2d at 1115.

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they also bear the reciprocal risk of erosion to their property and resulting loss of lands.

[3] Under the Act, sand placed landward of the dividing line with sovereignty lands becomes the property of the upland owner. *See* § 161.141, Fla. Stat. (2004).

The owners of upland properties along critically-eroded beaches also benefit substantially under the Act. As the Florida Supreme Court stated:

> [T]he Act benefits private upland owners by restoring beach already lost and by protecting their property from future storm damage and erosion. *Moreover, the Act expressly preserves the upland owners' rights to access, use, and view, including the rights of ingress and egress. See § 161.201. The Act also protects the upland owners' rights to boating, bathing, and fishing. See id. Furthermore, the Act protects the upland owners' view by prohibiting the State from erecting structures on the new beach except those necessary to prevent erosion. See id. ... As a result, at least facially, there is no material or substantial impairment of these littoral rights under the Act.*

Id. (emphasis added) (citation omitted). As the highlighted language makes clear, the Act expressly retains essentially *all littoral rights* of each owner of upland property. Indeed, every existing littoral right (including rights of access, use, view, ingress/egress, boating, fishing, and bathing) is retained *and* new statutory rights are enacted (including the prohibition against construction of structures on the public beach unless necessary to prevent erosion, and the reversion to the status quo if a beach restoration project is not

timely commenced, or halted, or a restored beach is not maintained).[4] *Id.*

The *only* littoral right of an upland owner that arguably might, if realized, be affected under the Act is the state-created common law right to potential future accretions, which is held in abeyance during the life of a beach restoration project.[5]

The way the Act works is that the existing mean high water line ("MHWL"), which varies over time, becomes a fixed erosion control line ("ECL"), set at the

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[4] As the Florida Supreme Court noted, the Act "provides for the cancellation of the ECL if (1) the beach restoration is not commenced within two years; (2) restoration is halted in excess of a six-month period; or (3) the authorities do not maintain the restored beach. *See* § 161.211. Therefore, in the event the beach restoration is not completed and maintained, the rights of the respective parties revert to the status quo ante." *Walton County*, 998 So. 2d at 1115.

[5] This case involves a shoreline at significant risk of eroding, not accreting. In a different context, little prospect has been noted for accreting coastlines in the United States. *See Massachusetts v. Envt'l Prot. Agency*, 549 U.S. 497, 521 (2007) (noting "actual" and "imminent" risks of rising sea levels). Given Florida's anticipated recurrent storm threats, Petitioner's accretion-based claim is very speculative.

then-current MHWL,[6] that separates the state's sovereign lands from the uplands. The critically-eroded beach is then restored and maintained with the ECL as the fixed property line between the upland properties and the sovereignty lands. Where the ECL represents the correct, pre-emergent MHWL, then "there would be no difference between the boundary under the common law and the boundary under the Act." *Walton County*, 998 So. 2d at 1118, n.15. (Fla. 2008).

In this situation, an upland owner continues to enjoy every pre-existing littoral right except the potential expansion of her property via accretions that hypothetically might form while the ECL is in place. As mentioned above, if a beach is not restored or maintained in accordance with the Act, the ECL is cancelled and the "rights of the respective parties revert to the status quo ante." *Id.* at 1115.

This litigation is based on the Petitioner's claim that the Act is unconstitutional because it has taken this common law accretion right without the payment of

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[6] The Act has a process for challenging the propriety of a proposed restoration project or the specific location of the ECL (which is set at the prevailing MHWL) prior to its recordation. *See* § 161.181, Fla. Stat. (2004). It also provides for eminent domain proceedings where setting the ECL effects an ouster from and transfer of *existing private land* to public ownership (e.g., where the ECL must be set landward of the prevailing MHWL due to engineering requirements). *See* § 161.141, Fla. Stat. (2004).

compensation.[7] Petitioners claimed they have lost a wide swath of littoral rights, but in actuality they retain *all* of their existing littoral rights (other than potential accretion) and are provided with additional statutory protections (as described above).

The Florida Supreme Court, in upholding the Act's facial constitutionality, held that the Act provides substantial benefits to upland owners and does not amount to a taking of the right of accretion, which is held in abeyance during the time period when the state bears all the risks of restoring and maintaining the critically-eroded beach. The Court concluded:

> [T]he Act effectuates the State's constitutional duty to protect Florida's beaches in a way that reasonably balances public and private interests. Without the beach renourishment provided for under the Act, the public would lose vital economic and natural resources. As for the upland owners, the beach renourishment protects their property from future storm damage and erosion while preserving their littoral rights to access, use, and view. Consequently, just as with the common law, the Act facially achieves a

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[7] Petitioner originally argued that the "right" to have property remain in contact with the water was also taken. The Florida Supreme Court recognized this asserted "right" as a means of ensuring the right of access, which the Act specifically preserves. *Walton County*, 998 So. 2d at 1119.

> reasonable balance of interests and rights to uniquely valuable and volatile property interests.

Id. at 1115. The Florida Supreme Court did not create or change any littoral rights in its decision; rather, it simply held that the State's protection of critically-eroded beaches under the Act is not facially unconstitutional. Moreover, it based its decision on existing state law doctrines, which support public efforts to restore shorelines and maintain boundaries between public and private lands. *Id.* at 1116-17. In short, the Florida Supreme Court held that the Act fairly balances the public interest in the state's critically-eroded beaches and the littoral rights of beachfront property owners in the context of avulsive events, critical erosion, and a state guarantee to maintain a prescribed shore.

ARGUMENT

The issue presented does not warrant this Court's review for two reasons. First, this case involves a state court deciding an issue of state law that raises no issue of state, regional or national importance that justifies this Court's review. Second, a "judicial taking" theory is wholly inapplicable. The Florida Supreme Court, using ordinary tools of constitutional adjudication, merely upheld the facial constitutionality of a decades-old state statute that allows the State to restore critically eroded beaches resulting in substantial economic and legal benefits to owners of uplands along the shoreline.

I. The Florida Supreme Court's Decision Implicates Only State Law Matters and Does Not Involve Any Issue Worthy of This Court's Review.

The Florida Supreme Court's decision is based on principles of state common and statutory law, and provides no conflicting or unsettled "important federal question" worthy of this Court's review. The opinion does not change the law in any respect or have broader federal application; it simply upholds the facial constitutionality of Florida's Beach and Shore Preservation Act, which was enacted many years ago pursuant to Florida's constitutional duty to protect its shorelines and beaches. In so doing, the decision affirms the legislature's balanced, if not elegant, manner of preserving critically eroded beaches, while also protecting the interests of upland property owners.

Petitioner overstates the nature of this case, which involves no physical taking of accreted lands nor any regulatory taking that deprives its members of essentially all meaningful use of their property. Notably, the right of potential future accretions is not a constitutional property right. Riparian/littoral rights are not mentioned in the federal constitution.[8] They are

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[8] Nor are such rights recognized in the Florida constitution. The only constitutional-based property rights at issue in this case are the state's rights and responsibilities with respect to public trust lands, which are embodied in the state consritution. *See* art. X, § 11, Fla. Const. (cited in *Walton County*, 998 So. 2d at 1109).

established by state law[9] and are subject to modification, provided a government regulatory program, such as the Act, does not go too far and result in an unconstitutional "taking."[10] Petitioner asks that this Court elevate accretion rights above a state statute that explicitly holds in abeyance a common law provision (accretion) under narrow circumstances where its application is rendered irrelevant. An asserted state common law right to potential accretions does not supersede Florida's Act under these circumstances.

Second, and more importantly, the inquiry here is one that evaluates only *state* common law and statutory considerations. This Court has consistently held that "state courts are the ultimate expositors of state law," and it will deviate from this rule only in "extreme circumstances." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). None of the extreme circumstances that the Court has noted in the past is present here. *See*

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[9] *See Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law"); *see also Game & Fresh Water Fish Comm'n v. Lake Islands, Ltd.*, 407 So. 2d 189, 191 (Fla. 1981).

[10] In *Lingle v. Chevron*, 544 U.S. 528 (2005), this Court recently reaffirmed that substantive due process challenges to governmental regulation of property rights are not subject to a higher judicial standard of review.

generally E. Gressman, K. Geller, et al., *Supreme Court Practice,* 142-146 (9th ed. 2007) (discussing extreme circumstances).

Here, the Florida Supreme Court decided the case based upon the common law relationship between the sovereign (in its proprietary, public trust capacity) and upland property owners in Florida, applying common law doctrines of accretion, erosion, and avulsion. Its decision worked only to resolve the balancing of state common law and statutory rights, without affecting federal law. Moreover, the Florida Supreme Court emphasized that its decision was "strictly limited to the context of restoring critically eroded beaches under the [Act]." *Walton County,* 998 So. 2d at 1120-21.

As the Florida Supreme Court determined, the Act is a reasonable, balanced method of ensuring that the State's critically eroded beaches are restored and protected while concurrently protecting the value of beachfront properties and the bundle of riparian/littoral rights of their owners. Because the decision involves only a state law matter and involves no federal issue of state, regional or national importance, jurisdiction should not be exercised.

II. The Florida Supreme Court's Decision Is Not a Judicial Taking.

Petitioner mistakenly claims that the Florida Supreme Court's decision falls into the category of a

"judicial taking."[11] Rather, the decision neither reverses prior precedent nor marks an unpredictable and sudden change in state law.

First, the decision can hardly qualify as a judicial taking. It involves the facial constitutionality of a state statute, not judge-made law that departs from established legal norms. The Act's challenged provisions had been on the books for more than forty years, its terms address only the narrow context of property rights along critically-eroded beaches, and it retains every littoral right other than potential future accretion. In analyzing the Act, the Florida Supreme Court was deferential to Florida's common law. The court reviewed the state's common law of littoral rights – with particular focus on accretion – and determined that the Act does not facially depart from constitutional norms.

Specifically, the court determined that the right of accretion is not implicated in situations where the Act applies. When the state establishes an ECL and restores (and then maintains) a critically eroded beach, it is the state – not the upland owner – who thereafter bears the risk of loss from a pattern of erosion. If repeated storm events ravage the beach, the state bears the risk and

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[11] A "judicial taking" may occur when a court, through sudden departure from established legal principles, has essentially changed long-standing property rights via judicial fiat so as to effect the "retroactive transformation of private into public property." *See Hughes v. Washington*, 389 U.S. 290, 296 (1967) (Stewart, J., concurring).

cost of repair. Moreover, because the ECL remains fixed at the pre-emergent MHWL separating upland property from the (formerly submerged) sovereign lands, even after a further destructive pattern of erosive events, the upland owner bears no risk of loss to her property resulting from a landward-migrating MHWL.

Lacking these protections, the common law's justification for the doctrine of accretion is based on the fact that the upland owner bears the risk of erosion and therefore equitably should receive the benefit of accreted lands that might occur. Specifically, the "significant historical foundation" of the right was discussed in *Board of Trustees of the Internal Improvements Trust Fund v. Sand Key Associates, Ltd.*, 512 So. 2d 934, 936-37 (Fla. 1987). In *Sand Key*, it was noted that the accretion right is based on principles of risk-bearing: if the upland owner bears the risk of loss from incursion of the sea, she deserves the benefit of lands gained from the sea via accretion. As Blackstone put it:

> And as to lands gained from the sea, either by *alluvion*, by the washing up of sand and earth, so as in time to make *terra firma;* or by *dereliction*, as when the sea shrinks back below the usual watermark: in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining....[T]hese owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible charge or loss.

Id. (citing 2 W. Blackstone, Commentaries 261-62). Similarly, this Court has recognized the risk/benefit basis for accreted lands, *see Banks v. Ogden,* 69 U.S. (2 Wall.) 57, 17 L.Ed. 818 (1864), noting that the right to accretions is based on "the principle of natural justice, that he who sustains the burden of losses and of repairs, imposed by the contiguity of waters, ought to receive whatever benefits they may bring by accretion[.]" *Sand Key*, 512 So. 2d at 936-37 (citing *Banks*, 69 U.S. (2 Wall.) at 67).

Here, the Act eliminates the historical basis for the littoral benefit of accretion by *eliminating the littoral risk*. Owners of private uplands bordering critically eroded beaches restored under the Act do not bear the risk of losing property due to incursion of the sea. Under the Act, during a project's life, the portion of an upland owner's property that formerly would have been lost to the sea's intrusion (and become sovereign lands) is protected by a buffer; its property lines are undiminished; and, the upland property itself remains at all times in the upland owner's hands and control. As the decision notes, under the Act, the historical justification for accretion, and thus, the doctrine itself, is simply not implicated, and no deprivation occurs.

Finally, Petitioner relies on three state law cases, which are distinguishable and provide no basis for applying "judicial taking" theories. First, in *State of Florida v. Florida National Properties, Inc.*, 338 So. 2d 13 (Fla. 1976), the Florida Supreme Court considered a dispute arising out of the state's attempt to set by statute the boundary of certain upland property along a

fresh-water lake at a point significantly landward of the prevailing common law line, putting in question the ownership of roughly one-half of the existing property of the private landowner. *Id.* at 16. Because the case was deemed governed by federal precedent contrary to state law – a doctrine which has since been overruled[12] – those aspects of *Florida National Properties* that depend upon that error have very little precedential value.

It is unsurprising that the court rejected the state's attempt to fix the boundary at a point other than the current MHWL, observing that such a result "would not comply with the spirit or letter of our Federal or State Constitutions nor meet present requirements of society."[13] *Id.* at 19. Rather than involving a carefully-balanced effort to effectuate the state's constitutional duty to preserve its shoreline in the face of critical erosion (as is presented here), the statute in *Florida National Properties* was what this Court considers to be a "classic taking in which government directly

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[12] The court in *Florida National Properties* determined that it was "apparent from [*Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973) and *Hughes* that Federal, not State, law governs the resolution of boundary line disputes between the sovereign and private owners whose lands border navigable bodies of water." *Florida Nat'l Props., Inc.*, 338 So. 2d at 17.

[13] Under the Act's careful balancing, in contrast, those requirements are met. *See Walton County*, 998 So. 2d at 1115.

appropriates private property or ousts the owner from his domain." *Lingle*, 544 U.S. at 539.

Second, the decision in *Sand Key* did not address a regulatory takings claim. It involved a quiet title action to resolve a dispute over existing accreted land. 512 So. 2d at 935. The property at issue had formed due to accretions allegedly caused by improvements that had not been constructed on the claimant's behalf, and were located one-half mile north of the claimant's land. *Id.* at 928. In determining that Sand Key was entitled to the existing accreted property, the Florida Supreme Court applied the common law principle that a riparian upland owner retains additional abutting land resulting from natural and artificial accretions not directly caused by an improvement to that owner's property. *Id.* at 941. The decision has no application here.

Third, the Florida Supreme Court's decision in *Belvedere Development Corporation v. Department of Transportation*, 476 So. 2d 649 (Fla. 1985), is easily distinguishable, on its facts and legal issues, from this case. First, *Belvedere* involved an actual physical taking of upland property versus a state regulatory program involving no physical taking. Second, *Belvedere* involved the severance of all riparian rights with no access easement to exercise them, versus the preservation of applicable riparian/littoral rights, including access, under the implementation of a critical state beach preservation program. Finally, *Belvedere* amounted to a ploy to avoid paying the true value for physically taking the uplands of a riparian property by separating its riparian rights from such property.

Importantly, the Florida Supreme Court in *Belvedere* stated that "we will not hold that riparian rights are never severable from the riparian lands. However, we must conclude that the act of condemning petitioners' lands without compensating them for their riparian property rights under these facts was an unconstitutional taking." *Id.* at 652. The emphasized language was prescient; here, none of the facts or policy issues in *Belvedere* is at issue.

In conclusion, because the issue below was a question of state law, in which state law precedents were fairly applied to an unresolved legal question, no support exists for a "judicial taking." The Florida Supreme Court's decision does not conflict with prior Florida law, much less constitute a sudden, unpredictable change in state law, and does not effect a "per se" "judicial taking."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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OPPOSITION BRIEF

No. 08-1151

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In The
Supreme Court of the United States

STOP THE BEACH RENOURISHMENT, INC.,

Petitioner,

v.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND, WALTON COUNTY and CITY OF DESTIN,

Respondents.

On Petition For A Writ Of Certiorari To The Florida Supreme Court

RESPONDENTS WALTON COUNTY AND CITY OF DESTIN'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

As the body of this brief makes clear, this Court should deny Petitioner's petition for writ of certiorari as to the questions presented in the petition. In addition, and in accordance with Supreme Court Rule 15.2, Respondents raise the following objections to the questions presented:

The questions presented in the petition do not accurately reflect the Florida Supreme Court's holding. If this Court grants the petition, Respondents, the City of Destin and Walton County, submit the following as the more accurately phrased questions:

I. FLORIDA'S LEGISLATURE MAY CONSTITUTIONALLY DEVELOP FLORIDA COMMON LAW PROPERTY RIGHTS; THE FLORIDA SUPREME COURT'S AFFIRMANCE OF SUCH DEVELOPMENTS DOES NOT CAUSE A "JUDICIAL" TAKING PROSCRIBED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

II. THE FLORIDA SUPREME COURT CORRECTLY DETERMINED THAT THE FLORIDA LEGISLATURE MAY ALTER COMMON LAW PROPERTY RIGHTS THAT HAVE NOT VESTED.

QUESTIONS PRESENTED – Continued

III. THE FLORIDA SUPREME COURT HELD THAT THE ACT CAN CONSTITUTIONALLY PERMIT THE STATE TO APPROVE THE ECL BUT THAT IT MUST COMPENSATE AN AFFECTED RIPARIAN LANDOWNER TO THE EXTENT OF ANY TAKING OF PROPERTY BY THE CREATION OF THE EROSION CONTROL LINE.

LIST OF PARTIES

Petitioner

Stop the Beach Renourishment, Incorporated.

Respondents

Florida Department of Environmental Protection; The Board of Trustees of the Internal Improvement Trust Fund; Walton County, Florida; and the City of Destin, Florida.

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JURISDICTION

This Court should not exercise jurisdiction over this case. It does not conflict with *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. 1985), rev'd on procedural grounds, *Ariyoshi v. Robinson*, 477 U.S. 902 (1986), as required by Sup. Ct. R. 10(b). In *Robinson*, the Ninth Circuit recognized that "[i]nsofar as judicial changes in the law operate prospectively to affect property rights ***vesting after the law is changed***, no specific federal question is presented by the state's choice of implement in changing state law" citing *Hughes v. Washington*, 389 U.S. 290, (1967) (Stewart, J. concurring) (emphasis added). The issues the *Robinson* court addressed are not presented by the facts of this case. The judicial decision affects: (1) littoral property rights not vested when the Supreme Court approved the 1970 Beach and Shore Preservation Act's constitutionality; or (2) littoral rights not altered at all.

Nor does this case present "an important question of federal law that has not been, but should be, settled by this Court" under Sup. Ct. R. 10(c). This case simply presents a state court's development of its own common law surrounding real property principles, a procedure this Court recognized as proper in *Hughes v. Washington*, 389 U.S. 290 (1967).

STATEMENT OF THE FACTS

Petitioner's entire challenge is premised upon a set of facts that do not exist. Petitioner posits that the Florida Supreme Court "suddenly and unexpectedly" changed Florida common law, which in turn caused a constitutional deprivation of common law property rights. Petition (hereinafter "Pet.") at 25, 31. The law which Petitioner now challenges, however, has existed for decades.

In 1965, the Florida Legislature enacted Chapter 161, Florida Statutes, entitled the Beach and Shore Preservation Act (the "Act"). The Act provided a process for private parties and governmental entities to obtain permits for beach and shore preservation projects. Under Section 161.051, Florida Statutes, any additions or accretion to the uplands caused by such projects remained the property of the State.

In 1970, the Florida Legislature amended the Act. The Act declared the legislative intent that it was in the public interest to make provisions for publicly financed beach nourishment and restoration projects. §161.141, *Fla. Stat.* The Act provided for the completion of a survey depicting the area of the beach to be restored and the location of a proposed "Erosion Control Line" ("ECL"). Once established, the ECL represented the landward extent of the claims of the state. §161.151(3), *Fla. Stat.* Prior to this statute, the Mean High Water Line ("MHWL") represented the landward extent of the claims of the State.

At the same time, the Florida Legislature provided for the vesting of title to lands after the filing of the ECL:

> (1) . . . title to all lands seaward of the [ECL] shall be deemed to be vested in the state by right of its sovereignty, and title to all lands landward of such line shall be vested in the riparian upland owners whose lands either abut the [ECL] or would have abutted the line if it had been located directly on the line of mean high water on the date the board of trustees' survey was recorded.
>
> (2) Once the [ECL] along any segment of the shoreline has been established in accordance with the provisions of ss. 161.141-161.211, the common law shall no longer operate to increase or decrease the proportions of any upland property lying landward of such line, ***either by accretion or erosion*** or by any other natural or artificial process, except as provided in s. 161.211(2) and (3).

§161.191, *Fla. Stat.* (emphasis added).

In addition, Section 161.201, Florida Statutes, preserved a landowner's common law riparian rights except as otherwise provided in Section 161.191(2), Florida Statutes, including but not limited to rights of ingress, egress, view, boating, bathing, and fishing if an upland owner or lessee who by operation of the Act ceased to be a holder of title to the MHWL.

The Act contemplated that the State might be required to take private property. If so, the Act specifically provides that if an authorized beach restoration, beach nourishment, and erosion control project cannot reasonably be accomplished without the taking of private property, the taking must be made by the requesting authority by eminent domain proceedings.

Twenty-five years after the amendment of this Act, the City of Destin's and Walton County's beaches were critically eroded by the 1995 Hurricane Opal. (R.App. at 1). Pursuant to the Act, the City and County sought a Joint Coastal Permit from the Department of Environmental Protection ("Department") to restore, through nourishment, 6.9 miles of their beaches. The beach restoration would add sand waterward of the mean high water line. The result of the project would widen the beach by 210 feet and increase its elevation. The project would also restore dunes. (R.App. at 1).

Based upon the authority vested in it by the Act, the Department issued a Notice of Intent to Issue the draft permit. In conjunction with the proposed beach nourishment project, the Board of Trustees of the Internal Improvement Trust Fund adopted resolutions approving surveys of the ECL for the County and City.[1] (R.App. at 3).

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[1] The Act gives the Board of Trustees authority to set the ECL. §161.161, *Fla. Stat.*

Save Our Beaches, Inc. ("SOB") and Petitioner Stop The Beach Renourishment, Inc. ("STBR") were formed in 2004 to, among other things, protect and defend private property rights. Both associations purported to represent landowners who claimed to be affected by the permit. They petitioned for formal administrative hearing, challenging issuance of the draft permit. (R.App. at 4).

In their Amended Petition, SOB and STBR claimed, among other things, that the draft permit and ECL resulted in an unconstitutional taking. SOB's and STBR's constitutional challenges were dismissed for determination in court proceedings. SOB and STBR pursued these lawsuits in a separate action in circuit court in Leon County, Florida. In that lawsuit, SOB and STBR challenged the facial constitutionality of the Act and the constitutionality of the Act as-applied. The non-constitutional issues proceeded to administrative hearing. (R.App. at 4).

In the recommended order, the administrative law judge ("ALJ") recognized that SOB and STBR alleged the infringement of only two riparian rights: the right to accretion and the right to have the property contact the water. Because the Act eliminated these common law riparian rights, the ALJ reasoned that the City and County were not infringing on them, assuming the constitutionality of the Act. The ALJ recommended that the Department enter a final order issuing the permit, which it did. (R.App. at 5).

STBR[2] appealed to the First District Court of Appeal, in and for the State of Florida. It argued that the Act was unconstitutional, as-applied, because it eliminated its members' riparian rights to accretion and to have their property contact the water. (R.App. at 6).

The City and County maintained that the Act was not unconstitutional, on its face or as-applied. They noted that even though STBR argued the Act was unconstitutional as-applied, it actually made a facial challenge. The City and County explained that the Act did not take STBR's members' property because it did not physically invade, use, or possess it in its entirety. The City and County further urged that under a regulatory takings analysis, STBR failed to show that its members lost all beneficial use of the entire piece of property. Rather, they noted, the Act only affects two of many riparian rights. (R.App. at 6-7).

The First District Court found the Act unconstitutional as-applied. *Save Our Beaches, Inc. v. Fla. Dep't of Envtl. Prot.*, 31 Fla. L. Weekly D1173 (Fla. 1st DCA 2006). The court held that riparian rights are property rights that cannot be constitutionally taken without just compensation. *Id.* The

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[2] SOB also appealed but was dismissed as a party because it did not have associational standing. *Save Our Beaches, Inc. v. Fla. Dep't of Envtl. Prot.*, 31 Fla. L. Weekly D1173 (Fla. 1st DCA 2006).

court agreed with STBR that its members' riparian rights to: (i) receive accretion and relictions to the property; and (ii) have the property's contact with the water remain intact, were eliminated by the Department's final order, which applied the Act. *Id.* The court held that because STBR's members' riparian rights were unconstitutionally taken without an eminent domain proceeding as required by Section 161.141, Florida Statutes, those rights were infringed upon. *Id.*

The State moved for rehearing and certification to the Florida Supreme Court. *Id.* The First District granted the certification motion to the extent that it certified the following question to be of great public importance:

> Has Part I of Chapter 161, Florida Statutes (2005), referred to as the Beach and Shore Preservation Act, been unconstitutionally applied so as to deprive the members of Stop the Beach Renourishment, Inc. of their riparian rights without just compensation for the property taken, so that the exception provided in Florida Administrative Code Rule 18-21.004(3), exempting satisfactory evidence of sufficient upland interest if the activities do not unreasonably infringe on riparian rights, does not apply?

Id.

The City and County then appealed to the Florida Supreme Court, which reversed. *Walton County v. Stop Beach Renourishment*, 998 So. 2d 1102

(Fla. 2008). In doing so, the Court concluded that the First District had incorrectly phrased its certified question in terms of an as-applied challenge and, therefore, rephrased the certified question as follows:

> On its face, does the Beach and Shore Preservation Act unconstitutionally deprive upland owners of littoral rights without just compensation?[3]

Id. at 1105.

To answer this question, the Supreme Court highlighted several undisputed principles. First, it emphasized the State's constitutional duty to protect Florida's beaches, citing Art. X, §11, Fla. Const. *Id.* at 1110. Next, the Court recognized that the extent of littoral rights are a matter of state law. Based upon its own early Florida law, the Court noted that the littoral rights to access, use, and view are nothing more than easements under Florida common law. *Id.* at 1112. The littoral rights to accretion and reliction, the Court observed, are distinct from the rights to

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[3] The Court noted that the First District should have refrained from considering what is essentially a facial challenge since STBR acknowledged that it was a party in circuit court to a facial challenge of the same act citing *Key Haven Assoc. Enters. v. Bd. of Trs. of the Internal Improvement Trust Fund*, 427 So. 2d 153, 157 (Fla. 1982) (explaining that if a party chooses to pursue a facial challenge in circuit court, the party is foreclosed from proceeding with a facial challenge before the district court in its appeal of final agency action).

access, use, and view because they are not a current right, but a contingent future possessory right. *Id.*

The Court then outlined how the common law had traditionally treated changes to the shoreline. It noted that under the doctrines of erosion, reliction, and accretion, the boundary between public and private land is altered to reflect gradual and imperceptible losses or additions to the shoreline. In contrast, under the doctrine of avulsion, the boundary between public and private land remains the MHWL as it existed before the avulsive event led to sudden and perceptible losses or additions to the shoreline. Most importantly, the Court recognized that Florida's common law had never fully addressed how public-sponsored beach restoration affects the interests of the public and the interests of the upland owners. *Id.* at 1112-1114.

After outlining the common law's historical balancing of public and private interests, the Court held that the Act continued this historical common law pattern: ensuring the public does not lose vital economic and natural resources and protecting landowner's property from future storm damage and erosion while preserving their littoral rights to access, use, and view. Equally important, the Court found that the Act effectuated the State's constitutional duty to protect its beaches, side-by-side with the common law's balancing of public and private interests. *Id.* at 1115.

The Court reasoned that the First District incorrectly held the Act was unconstitutional because it had only analyzed the Act under the doctrine of accretion, not the doctrine of avulsion. As explained in its earlier case law, the Court emphasized that, under the doctrine of avulsion, the boundary between public lands and privately owned uplands remains the MHWL as it existed before the avulsive event. The Court held that the Act – which reclaims storm-damaged shoreline by adding sand to submerged sovereignty lands – allowed the State to do no more than it could do under the common law. The Court referenced *State v. Florida National Properties, Inc.*, 338 So. 2d 13 (Fla. 1976), during this discussion. *Walton County*, 998 So. 2d at 1116-1117.

The Court then addressed the landowner's right to accretion, which the First District held had been taken without compensation. The Court delineated the common law reasons for accretion and explained how the Act removed many of the reasons for the very existence of the accretion doctrine. For instance, the Court noted that that the Act removed the upland owner's risk of losses and repairs due to erosion – now the State bears that risk. Because the risk of erosion was one of the historical reasons to give a landowner the right to accretion, the Act's elimination of the riparian landowner's risk of erosion made unnecessary the concomitant right to future accretion. *Id.* at 1118.

The Court then analyzed the First District's conclusion that the Act was unconstitutional because

it eliminated the landowner's right to have the property's contact with the water remain intact. The Court noted that its prior cases had focused on the right of access as the paramount right, which was served by contact with the water. But as the Court noted, if the access was not impaired, then the right of contact was unnecessary. Although it did not discuss its prior reference to the fact that the right of access was solely an easement under its earlier decisions, presumably the Court factored this into its analysis when concluding that the Act fully preserved the right to access, with or without direct contact with the water. *Id.* at 1119-1120.

Lastly, the Florida Supreme Court distinguished *Belvedere Dev. Corp. v. Department of Transp.*, 476 So. 2d 649 (Fla. 1985), upon which the First District had relied to find that littoral rights could not be severed from uplands, by separating the uplands to the land with the littoral rights by a road. In *Belvedere*, the Department of Transportation severed the littoral rights in an attempt to limit the compensation for uplands in eminent domain proceedings. The Court held that littoral rights "cannot be severed by condemnation proceedings without the consent of the upland owner." *Id.* at 653. The Court limited its holding to the context of condemnation of upland property. *See id.* at 652.

Justice Lewis authored a lengthy dissenting opinion, with which one other Justice concurred. *Walton County*, 998 So. 2d at 1121. Justice Lewis quarreled with the majority's conclusion that riparian

property need not touch the water to maintain its riparian character, as long as the landowner retained access to the water. He ignored the fact that the Act ensured riparian landowners would continue to receive all rights associated with riparian ownership, even if their property did not touch the water. Justice Lewis portrayed touching the water as a "right," rather than what gave property its riparian character. *Id.* at 1124-1125.

His rationale for this belief was premised upon *Belvedere* and *Board of Trustees of the Internal Imp. Trust Fund v. Sand Key Associates, Ltd.*, 512 So. 2d 934, 937 (Fla. 1987), neither of which directly addressed the issue presented by the facts of this case. *Id.* at 1122-1123. His dissent theorized that the majority's holding would deprive other landowners of their riparian rights, even though the majority had expressly limited its holding to re-nourishment projects under the Act. *Id.* at 1128. Justice Lewis never explored the issues related to the Act's elimination of the right to future accretion, and presumably agreed that the Act's elimination of the right to accretion was constitutional.

After the Florida Supreme Court denied STBR's rehearing motion, this petition followed.

REASONS FOR DENYING THE WRIT

Petitioner has failed to provide good reason for this Court to ignore its own precedent. For thirty

years, this Court has followed its own rule of law that the law of real property is, under our Constitution, left to the individual States to develop and administer. The Florida Supreme Court has simply continued the development of its own common law – a process which is not stagnant but fluctuates – in light of real property developments related to beach renourishment projects. Its rationale was premised upon a detailed analysis of the genesis of a Florida riparian landowner's right to accretion and access to the water. Its ultimate decision honored the State's constitutional duty to protect Florida's beaches, while concomitantly respecting a landowner's common law riparian rights. Petitioner's argument results from its refusal to recognize the foundation for these common law doctrines, or that the common law fluctuates when the reason for these doctrines are altered. The Florida Supreme Court's decision peacefully co-exists with this Court's constitutional mandates and the Fifth and Fourteenth Amendments to the United States Constitution.

I. FLORIDA'S LEGISLATURE MAY CONSTITUTIONALLY DEVELOP FLORIDA COMMON LAW PROPERTY RIGHTS THAT HAVE NOT VESTED WITHOUT CAUSING A "JUDICIAL" TAKING PROSCRIBED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. The Florida Supreme Court Acted Consistent With This Court's Constitutional Limitations Placed Upon A State's Ability To Develop Its Own Common Law Property Rights.

Petitioner claims that this case presents "a unique opportunity" for this Court to address the "constitutional question" whether a state court can affirm the Florida Legislature's right to "eliminate" common law property rights. Pet. at 15. This opportunity has long past. In *Hughes v. Washington*, 389 U.S. 290 (1967), this Court addressed this very issue. There, an 1889 statute ambiguously expressed whether the right to accretion was eliminated, thereby rendering uncertain a property owner's right to the accretion that had accrued between that time and 1966. *Id.* at 296. *Hughes* made clear that a state may alter the common law right to accretion as long as it does so unambiguously and does not attempt to impinge upon accretion that has already accrued.

Indeed, Justice Stewart's concurrence only supports the ruling below. Justice Stewart recognized that

> Surely it must be conceded as a general proposition that the law of real property is, under our Constitution, left to the individual States to develop and administer. And surely Washington or any other State is free to make changes, either legislative or judicial, in its general rules of real property law, including the rules governing the property rights of riparian owners.

Hughes, 389 U.S. at 295.

Not once does Petitioner recognize a State's undisputed right to develop its real property common law as it relates to riparian owners. *See also Oregon State Land Board v. Corvallis Sand and Gravel Company*, 429 U.S. 363, 378-380 (1977) ("Under our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States."); *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

Petitioner attempts to overcome this point by arguing that the Florida Supreme Court has previously defined littoral or riparian rights as "constitutional." Pet. at 16. Even assuming this to be true, the Florida Supreme Court's later conclusion that certain aspects of common law littoral rights are not vested constitutional rights does not make its decision unconstitutional. Florida's Legislature has defined common law property rights so that constitutionally vested property rights are not impinged. *Hughes* approves such a result.

1. The Florida Supreme Court Properly Held That Florida's Legislature Could Eliminate The Right To Future Accretion Where The Common Law Reasons For The Development Of The Doctrine Have Changed.

Parsing out Petitioner's rhetoric of what the Florida Supreme Court did, Petitioner appears to complain that by affirming the Legislature's right to alter the common law surrounding non-vested littoral rights, the Court somehow deprived Petitioner's members of an alleged constitutional right to a permanent common law *definition* of littoral rights.

Petitioner's claimed basis for this constitutional right to a common law definition of littoral rights appears to emanate from *State v. Florida National Properties, Inc.*, 338 So. 2d 13, 17 (Fla. 1976). Petitioner claims that in *Florida National Property*:

> The Florida Supreme Court expressly recognized the nature of the littoral right to accretion was a future right: "the State, through the Trustees, claims not only the lands to which Plaintiff has already gained title through the operation of accretion and reliction, but also seeks to deny to Plaintiff the right to acquire additional property in the future through the process of accretion and reliction."
>
> . . . By requiring the establishment of a fixed boundary line between sovereignty bottom lands and Plaintiff's riparian lands, Fla.Stat.

> s 253.151 . . . constitutes a taking of Plaintiff's property, including its riparian rights to future alluvion or accretion, without compensation in violation to the due process clause of the Fourteenth Amendment of the United States Constitution and the due process clause of . . . the Florida Constitution.

Pet. at 18.

The Florida Supreme Court did not make the rulings which Petitioner quotes. Rather, the trial court in that case issued these rulings. The Supreme Court simply set forth the trial court's judgment in its opinion. Although the Court affirmed the trial court's judgment, it did not adopt the trial court's reasoning as its own, or ever directly address whether a statute would be unconstitutional if it changed future rights to accretion or reliction, particularly when it simultaneously eliminated the landowner's risk of erosion. The Florida Supreme Court correctly ignored a prior case that did not directly address the issue before it in this case.

Not only is there no precedent that creates a permanent common law definition of littoral rights that encompasses the future right to accretion, the Florida Supreme Court's ruling is perfectly consistent with its prior explanation of the historical need for the accretion doctrine. In *Board of Trustees of the Internal Imp. Trust Fund v. Sand Key Associates, Ltd.*, 512 So. 2d 934 (Fla. 1987), the Court recognized that one of the very reasons for the right to accretion is the detriment of erosion:

> Almost all jurists and legislators . . . both ancient and modern, have agreed that the owner of the [waterfront property] . . . is entitled to these additions. By some the rule has been vindicated on the principle of natural justice, that he who sustains the burden of losses and of repairs, imposed by the contiguity of waters, ought to receive whatever benefits they may bring by accretion . . .

Id. at 937.[4]

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[4] In fact, the *Sand Key* court noted that the Florida Legislature has continuously redefined the common law of riparian rights to coincide with public policy. In 1856, the Florida Legislature expanded waterfront owners' rights by modifying the common law rule concerning artificial additions to waterfront property in the enactment of the Butler Act. Ch. 791, Laws of Fla. (1856). This "Act to benefit Commerce" provided that the State of Florida, in consideration of this benefit, would divest itself of all right, title, and interest to lands covered by water lying in front of land of a citizen vesting title in riparian proprietor owners and "giving them the full right and privilege to build wharves into streams or waters of the Bay or Harbor as far as may be necessary . . . and to fill up from the shore, bank or beach, as far as may be desired, not obstructing the channel." In 1921, this Act was amended to specify that this grant of title did not affect submerged lands "until actually filled in or permanently improved." *See* ch. 8537, Laws of Fla. (1921). In 1957, this public policy was changed because of concern for the rights of the public in submerged sovereignty lands and these additional statutory riparian and littoral rights were repealed. *See* ch. 57-362, Laws of Fla. Section 161.051 was enacted in 1965 as part of the chapter entitled "Beach, Shore and Preservation Act," and has as its intent the regulation of construction,

(Continued on following page)

At the same time the Act suspends accretion for the duration of the project since the ECL can be reversed, it eliminates a landowner's burden to bear the future common law risk of erosion. Interestingly, Petitioner does not complain that its members' right to erosion is a constitutional right that it must bear. The Florida Legislature had every right to alter a common law principle to reflect a change to its very right of existence.

Petitioner's complaint that the Supreme Court cannot undo 100 years of property rights misses the mark. Pet. at 20. The Florida Legislature *can* alter unvested common law property rights. Petitioner refuses to recognize this point, even though this Court has affirmed this principle. *Hughes* at 295-296. The only constitutional limitation upon the Florida Legislature is that it cannot take away a landowner's vested property rights without due process or just compensation. Petitioner does nothing in its petition to overcome the constitutionally approved principle that the Legislature can alter a contingent common law property interest.[5]

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reconstruction, and other physical improvements on waterfront properties.

[5] Petitioner asserts that this issue was not raised below by any party and implies that the Florida Supreme Court concocted it all on its own. Pet. at 19, n. 23. This statement is inaccurate. *See* R.App. at 13, 29, 33.

2. The Florida Supreme Court Acted Well Within Constitutional Parameters When It Recognized That A Riparian Landowner's Common Law Right Of Access To The Water Is Satisfied Regardless Of Whether Its Property Directly Touches The Mean High Water Line.

Petitioner claims the Florida Supreme Court has eliminated its members' constitutional right to contact with the water. Pet. at 21-23. Petitioner argues that the very right to be a riparian landowner is based upon contact with the water. All other riparian rights, Petitioner claims, simply disappear if contact with the water dissipates. Except for making this bald assertion, Petitioner fails to carry forward this logic.

It cannot. Contact with the water is not a right, but what gives the property its riparian character. The Act did not change the riparian character of the property. As it pertains to riparian landowners whose beach is lost and re-nourished by the State under the Act, all riparian rights are expressly preserved regardless of where the ECL is set. §161.201, *Fla. Stat.* Thus, a riparian landowner remains a riparian landowner under the Act, with all rights of a riparian landowner. Petitioner fails to explain what its members cannot do as riparian landowners after the ECL was established that they could do prior to the establishment of the ECL.

B. A Judicial Taking Has Not Occurred Because The Florida Supreme Court Did Not Suddenly Change State Law Nor Did It Declare A State Property Right Never Existed.

Petitioner argues that judicial takings need to be stopped, and this Court has not done enough to stop them. Pet. at 31. Petitioner cites fifteen cases in which this Court has denied certiorari of alleged judicial taking cases. Even assuming there is an epidemic of judicial takings, the facts of this case do not present one. This is not the type of case like *Hughes* where there was a "sudden change in state law, unpredictable in terms of the relevant precedents." *Hughes,* 389 U.S. at 266.

Petitioner cries "sudden" but ignores the fact that the relevant portions of the Act were created in 1970. This law – and how it works – has been on the books for over thirty-five years, including the suspension of the right to future accretion and creation of the ECL as the boundary.[6] By no means is this a sudden change in Florida common law. Nor was there anything ambiguous about what was said in the Act.

Moreover, the Florida Supreme Court's decision cannot remotely be construed as one that unconstitutionally holds a property right never existed. The

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[6] Nothing in the record shows if Petitioner's members purchased their riparian property before or after the enactment of the Act.

Florida Supreme Court has noted for decades that riparian rights (other than accretion, reliction and erosion) were easements. *Brickell v. Trammel*, 82 So. 221, 227 (Fla. 1919) ("These special rights are easements incident to the (littoral) holdings and are property rights that may be regulated by law, but may not be taken without just compensation and due process of law. The common-law (littoral) rights that arise by implication of law give no title to the land under navigable waters except such as may be lawfully acquired by accretion, reliction, and other similar rights."); *Broward v. Mabry*, 50 So. 826, 830 (Fla. 1909) (same). The Florida Supreme Court recognized that these easements remain intact under the Act, regardless of whether the property touches the water. It is these easements that are the common law "rights" of riparian landowners.

Petitioner cites *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994) (Scalia, J., and O'Connor, J., dissenting from denial of the petition for writ of certiorari), to prove its point that because this Court has not done its job to curtail judicial taking cases, "state courts have become more aggressive in 'invoking non-existent rules of substantive law' to deprive landowners of property." Pet. at 30-31. Petitioner does applaud the federal circuit courts that it claims have cut-off such attempts.

Petitioner cites *Robinson v. Ariyoshi*, 753 F.2d 1468, 1474 (9th Cir. 1985), rev'd on procedural grounds, *Ariyoshi v. Robinson*, 477 U.S. 902 (1986), as one example of what federal circuits should do to

prevent judicial takings. Yet as explained *supra* at 1, *Robinson* actually supports the outcome here. In *Robinson*, the Ninth Circuit addressed a party's right to irrigation water that had been given to it many years before through court decision. The court presented the substantive question as "whether the state can declare, by court decision, that the water rights in this case have not ***vested.*** The short answer is no." *Id.* at 1473. (emphasis added). However, the Ninth Circuit recognized that "[i]nsofar as judicial changes in the law operate prospectively to affect property rights ***vesting after the law is changed***, no specific federal question is presented by the state's choice of implement in changing state law" citing *Hughes v. Washington*, 389 U.S. 290, (1967) (Stewart, J. concurring) (emphasis added).

If anything, *Robinson* supports the Florida Supreme Court's conclusion that future rights that have not vested may be altered without impacting constitutional rights. This case involves nothing more than a court approving a legislature's thirty-year-old elimination of unvested common law property rights, to wit: future accretion, and replacing it with protection of loss by erosion. This Court has recognized that state courts may do so; no other federal circuit courts have ruled to the contrary. The facts of this case do not justify this Court exercising its jurisdiction to curb the allegedly rampant use of judicial takings.

II. THE FLORIDA SUPREME COURT CORRECTLY DETERMINED THAT THE FLORIDA LEGISLATURE MAY ALTER COMMON LAW PROPERTY RIGHTS THAT HAVE NOT VESTED.

Once again, Petitioner's argument is premised upon a distorted view of what the Act accomplished and what the Florida Supreme Court did. The Act altered the common law surrounding the right to future accretion. It did so because the Act replaced the obligation that a landowner bear the risk of future erosion, one of the common law reasons for the right to accretion. The Act also kept intact the riparian landowner's right to access the water, which has been a right by easement under decade-old Florida law.

Petitioner claims that the Florida Supreme Court approved the replacement of constitutional rights with statutory rights. As explained *supra* at 15, 19, common law rights that had not vested were not constitutional. Authority Petitioner relies upon to make its argument recites this very point. *Robinson v. Ariyoshi*, 753 F.2d 1468, 1474 (9th Cir. 1985), rev'd on procedural grounds, *Ariyoshi v. Robinson*, 477 U.S. 902 (1986) ("[i]nsofar as judicial changes in the law operate prospectively to affect property rights ***vesting after the law is changed***, no specific federal question is presented by the state's choice of implement in changing state law").

Petitioner's arguments overlook this crucial step. The issue is whether the Florida Legislature can alter a common law property right. It can. While it cannot do so to effectuate a taking of a current property right, it can do so in a way that effects a right that has yet to occur. Notably, Petitioner refuses to engage in a discussion of how the right to accretion that may or may not occur in the future can be a vested property right. By ignoring this step, Petitioner asks this Court to accept jurisdiction of a constitutional issue that is not presented by the facts and background of this case.

Petitioner attempts to equate these unvested common law rights to the constitutional rights of free speech, access to the courts, equal protection, due process, and right to privacy. (Pet. at 35). These are rights that the Constitution expressly guarantees. Property interests are not created by the Constitution. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). Although property interests are protected by the federal Due Process and Takings Clauses, the property interests themselves arise from independent sources, such as state law. *Id.* The extent of those property rights are defined by Florida's common law. *Hughes*, 389 U.S. at 295.

III. THE FLORIDA SUPREME COURT HELD THAT THE ACT CAN CONSTITUTIONALLY PERMIT THE STATE TO APPROVE THE ECL BUT THAT IT MUST COMPENSATE AN AFFECTED RIPARIAN LANDOWNER TO THE EXTENT OF ANY TAKING OF PROPERTY BY THE CREATION OF THE EROSION CONTROL LINE.

Petitioner's final argument is premised upon a logically flawed theory, and repeats many of its prior complaints. Petitioner claims that Florida's legislature altered a landowner's property line without due process when it changed the property boundary from the MHWL to the ECL. This argument is flawed for two obvious reasons.

First, it is premised upon Petitioner's erroneous belief that the Florida Supreme Court has previously held that "constitutionally protected" littoral rights cannot be separated from littoral property. Pet. at 37. Petitioner cites *Belvedere Dev. Corp. v. Department of Transp.*, 476 So. 2d 649, 651 (Fla. 1985).

Belvedere is not relevant to the facts of this case. In *Belvedere*, the Department of Transportation (DOT) sought to acquire uplands in fee simple absolute, while expressly reserving the littoral rights to the former upland owners. 476 So. 2d at 649. DOT severed the littoral rights in an attempt to limit the compensation for uplands in eminent domain proceedings. In *Belvedere*, the Florida Supreme Court was particularly concerned that the former upland owners did not have the actual ability to exercise any

of their reserved littoral rights since they held no easement or right to enter upon their former land. The Court thus held in *Belvedere* that littoral rights "cannot be severed by condemnation proceedings without the consent of the upland owner." *Id.* at 653. In so holding, the Court emphasized that its decision was limited to the context of condemnation of upland property. *Id.* at 652.

The Court did not hold in *Belvedere* that riparian rights can never be severed from upland property without the owner's consent. Indeed, the Court expressly declared that "we will not hold that riparian rights are never severable from the riparian lands." *Belvedere*, 476 So. 2d at 652. Rather, the Court expressed concern that the upland landowners in *Belvedere* would have "no easement or other retained right" to cross DOT's newly acquired riparian lands to get access to the water or to build a dock to the water. *Id.* at 651.

This case does not involve a condemnation proceeding to physically take Petitioner's members' lands without paying any compensation for the riparian rights. The landowners will retain title to and possession of all of their upland land. Also, unlike *Belvedere*, the Act, by statutory grant, guarantees the private landowners continued full rights of access to the water, "including but not limited to rights of ingress, egress, view, boating, bathing, and fishing." Fla. Stat. §161.201.

The attempted severance and reservation of riparian rights by DOT in *Belvedere* to avoid payment of full just compensation in an eminent domain action bears no resemblance to the State Legislature's limited modification of the common law to protect both public and private interests in critically eroded beach areas. Unlike DOT, the Legislature has the power to modify the common law, an important point which Petitioner continues to ignore.

Petitioner's argument is also flawed because it ignores the Florida Supreme Court's clear language that if the ECL takes a portion of the land owned by the Petitioner's members, then it would be a taking and must be compensated. *Walton County*, 998 So. 2d at 1118, n. 15. Notably, Petitioner never outlines how the new ECL causes its members a compensable property loss. Petitioner's members received a benefit: the re-nourishment of a critically eroded beach.

CONCLUSION

Petitioner correctly recites that a taking is measured by what an opinion does. Pet. at 40, citing *Hughes*, 389 U.S. at 297-298. Here, the Florida Supreme Court's opinion leaves Petitioner's members' **vested** common law property rights intact. The Supreme Court's opinion approved a change in the common law as to future contingent rights (accretion) because the very foundation (erosion) for that future

right had changed – to favor riparian landowners. Such a change in the common law is constitutional. At bottom, then, Petitioner's members have no less than they did before the ECL: vested riparian rights and the right to an as-applied challenge if the ECL impinged upon any of their reasonable investment-backed expectations.

Respectfully submitted,

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IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA
SC06-1447

WALTON COUNTY and THE CITY OF DESTIN,

Petitioners/Appellants,

vs.

SAVE OUR BEACHES and STOP THE BEACH RENOURISHMENT, INC., FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION AND THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND,

Respondents/Appellees.

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEALS
TALLAHASSEE, FLORIDA

PETITIONERS/APPELLANTS' INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Appellants, Walton County and the City of Destin, will be individually referred to as the "County" and "City" or collectively as "Appellants." Appellee, Save Our Beaches, Inc., will be referred to as "SOB." Appellee, Stop the Beach Renourishment, Inc., will be referred to as "STBR." Appellee, Department of Environmental Protection will be referred to as the "Department." Appellee, Board of Trustees of the Internal Improvement Trust Fund, will be referred to as the "Trustees."

The Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands will be referred to as the "Permit." The Beach and Shore Preservation Act, Sections 161.141-161.211, Florida Statutes, will be referred to as the "Act."

References to the record on appeal will cite to "R," followed by the appropriate volume, then appropriate page number. References to the DOAH final hearing transcript will cite to "T," then appropriate page number. References to the First District briefs will cite to "A" for the Initial Brief, "B" for the City/County Answer Brief, "C" for the Department Answer Brief, and "D" for the Reply Brief, then the appropriate page number. References to the First District opinion contained in the required attached appendix will cite to "Op" then the appropriate tab and page number.

STATEMENT OF THE CASE AND FACTS

The City of Destin and Walton County's beaches were critically eroded by Hurricane Opal in 1995 and also by subsequent hurricanes. (R:7; T:23). The 2004 Hurricane Ivan further eroded these beaches. (T:141). The Florida Legislature has declared that beach erosion is a "menace to the economy and general welfare of the people of this state." § 161.088, Fla. Stat. (B:43). The Beach and Shore Preservation Act provides the mechanism for local government to restore and nourish Florida beaches. §§ 161.011, et seq., Fla. Stat.

The Department of Environmental Protection declared the City and County's beaches critically eroded. (T:23; Op1:2). Pursuant to the Act, the City and County sought a Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands from the Department of Environmental Protection to restore through nourishment 6.9 miles of their beaches declared to be critically eroded. (R1:7; T:23). The beach restoration would add sand to the seaward side of the beach. (R1:6-14). The project would widen the beach 210 feet and increase its elevation. (R1:6-14). The project would also restore dunes. (R1:7).

The mean high water line ("MHWL") is the boundary between submerged land owned by the State and those upland landowners who border the

MHWL.[1] § 177.27(14), Fla. Stat. (C:2). In designated critically eroded shoreline areas, the Act requires the Board of Trustees of the Internal Improvement Fund to establish an erosion control line ("ECL"), which becomes the boundary for those landowners whose property borders the MHWL. §§ 161.141-161.211, Fla. Stat. (C:2).

The MHWL guides the Trustees in setting the ECL. (C:2-3). If setting the ECL requires an actual taking of a landowner's property, however, the Act requires that it be done by eminent domain. § 161.141, Fla. Stat. (C:3). Moreover, if the beach erodes landward of the ECL, the Act provides a mechanism to cancel the ECL if the agency responsible for the beach fails to restore the area. § 161.211(3), Fla. Stat. (C:3).

The Act only affects riparian rights in designated critically eroded shoreline areas. (Op1:7). Even in these areas, the Act only eliminates a landowner's common law rights to accretion and reliction, contact of the upland with the water, and risk of erosion. §§ 161.191(2) and 211(3), Fla. Stat. (B:24). All other common law riparian rights are reserved to the landowner, including the right of ingress, egress, view, boating, bathing, and fishing. § 161.201, Fla. Stat. (B:24). The State is prohibited from erecting any

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[1] The MHWL is an average height of the high water over 19 years. The MHWL is the intersection of the tidal plane of mean high water with the shore. §§ 177.27(14)-(15). (C:2).

structures seaward of the ECL except those necessary to prevent erosion. (B:24).

Administrative rules were promulgated to assist the Trustees and Department in implementing their responsibilities regarding sovereign submerged lands. 18-21.002 (1), F.A.C. Rule 18-21.004, Florida Administrative Code, provides the criteria for the Department to determine whether to approve the requests for activities on sovereignty submerged land. Subsection (3) provides that none of the provisions of the rule "shall be implemented in a manner that would unreasonably infringe upon the traditional, common law riparian rights . . . " Paragraph (3)(b) further provides:

> Satisfactory evidence of sufficient upland interest is not required . . . when a governmental entity conducts restoration and enhancement activities, provided that such activities do not unreasonably infringe on riparian rights.

(Op1:5-6).

Based upon the authority vested in it by the Act, the Department issued a Notice of Intent to Issue the challenged Permit on July 15, 2004. (R:6). In conjunction with the proposed beach nourishment project, the Trustees adopted resolutions approving surveys of the ECL for the County and City. (R3:406).

Save Our Beaches, Inc. and Stop The Beach Renourishment, Inc. were formed in 2004 to, among other things, protect and defend private property

rights. (R3:415). Both associations purported to represent landowners who claimed to be affected by the permit. (R3:415). They petitioned for formal administrative hearing, challenging issuance of the draft permit. (R3:406). STBR also petitioned for formal administrative hearing challenging the ECL. (R1:119). Because the ECL was already the subject of a circuit court lawsuit, STBR deferred the issues surrounding the constitutionality of the ECL. (T:98; R3:417).

In the Amended Petition, SOB and STBR claimed that the Permit and ECL resulted in an unconstitutional takings. (R1:123). After SOB and STBR conceded DOAH was without jurisdiction to entertain the constitutional issues, the administrative law judge ("ALJ") dropped the constitutional challenge from the administrative proceeding. (1:140, 143). Prior to the administrative hearing, SOB and STBR filed a separate action in circuit court in Leon County, Florida, challenging the facial constitutionality of the Act. (B:29).

The non-constitutional issues proceeded to administrative hearing. (T:1). SOB and STBR challenged whether: (1) the City and the County gave reasonable assurance that applicable water quality standards would not be violated; and (2) whether the City and County had obtained, or were able to obtain, all requisite private property rights necessary to implement the proposed project. (R3:417). At the hearing, neither SOB nor STBR presented evidence of the Act's economic impact on its members' properties

or of its members' investment-backed expectations (T:147-187).

In the recommended order, the ALJ found that the City and County gave reasonable assurances that the applicable water quality standard would not be violated. (R3:422). The ALJ also held that the City and County had obtained the private property rights needed to implement the project. (R3:428). The ALJ recognized that, under Rule 18-21.004(3)(b), the City and County need not provide evidence of an upland interest if the beach nourishment activities did not unreasonably infringe on the landowners' riparian rights. (R3:425). The ALJ noted that SOB and STBR alleged the infringement of only two riparian rights: the right to accretion and the right to have the property contact the water. (R3:428). Because the Act eliminated these common law riparian rights, the ALJ reasoned that the City and County were not infringing on them, assuming the constitutionality of the Act. (R3:428). The ALJ recommended that the Department enter a final order issuing the permit. (R3:431).

The Department determined that the permit was properly issued pursuant to existing statutes and rules, including the Act; adopted the recommended order in its entirety; and entered its final order issuing the permit. (R3:398, 402).

SOB and STBR appealed to the First District Court of Appeal. (R3:436). They did not challenge the water quality finding adopted by the Department in

its final order. (Op1:12). Rather, they argued that the Act was unconstitutional, as-applied, because it eliminated their riparian rights to accretion and reliction and to have their property contact the water. (Op1:12, 18).

In defense of this appeal, the City and County argued that neither SOB nor STBR had associational standing. (B:7). The First District agreed that SOB was without standing to bring associational claims. (Op1:13). However, the court found that STBR's members had sufficient adverse interests to justify associational standing. (Op1:13-15). The court rejected the City and County's argument that associational standing was unavailable when an association made an as-applied constitutional challenge. (Op1:14-15).

The City and County also maintained that the Act was not unconstitutional, on its face or as-applied. (B:30-40). The City and County clarified that despite SOB and STBR's as-applied constitutional challenge to the Act, their challenge was facial. (B:25). The City and County explained that the Act did not take SOB or STBR's members' property because it did not physically invade or occupy the property, did not deprive the owners of all beneficial use of the entire parcels of property, and did not constitute a taking under the *Penn Central ad hoc* takings test. (B:49-46).

The First District found the Act unconstitutional as-applied. (Op1:2). The court agreed with STBR that its members' riparian rights to: (1) receive accretions

and relictions to the property; and (2) have the property's contact with the water remain intact, were eliminated by the Department's final order, which applied the Act. (Op1:18). Thus, the court held that the Act as-applied resulted in a taking of STBR members' property without an eminent domain proceeding as required by Section 161.141, Florida Statues [sic], and was therefore unconstitutional. (Op1:18).

The State, City, and County moved for rehearing and certification. (Op2:1). The First District granted the certification motion to the extent that it certified the following question to be of great public importance:

> Has Part I of Chapter 161, Florida Statutes (2005), referred to as the Beach and Shore Preservation Act, been unconstitutionally applied so as to deprive the members of Stop the Beach Renourishment, Inc. of their riparian rights without just compensation for the property taken, so that the exception provided in Florida Administrative Code Rule 18-21.004(3), exempting satisfactory evidence of sufficient upland interest if the activities do not unreasonably infringe on riparian rights, does not apply?

(Op2:2).

This timely appeal followed.

STANDARD OF REVIEW

The determination of a statute's constitutionality is a question of law reviewed *de novo* by this Court. *Fla. Dept of Revenue v. City of Gainesville,* 918 So. 2d 250, 256 (Fla. 2005). "While we review decisions striking state statutes *de novo,* we are obligated to accord legislative acts a presumption of constitutionality and to construe challenged legislation to effect a constitutional outcome whenever possible." *Dept. of Revenue v. Howard,* 916 So. 2d 640, 642 (Fla. 2005).

SUMMARY OF ARGUMENT

The First District held that the Beach and Shore Preservation Act, as applied to STBR members, unconstitutionally deprived them of two riparian rights without compensation. In reaching this conclusion, the First District incorrectly segmented the two riparian rights from each of the STBR members' individual properties as a whole. In turn, the First District employed the wrong takings analysis. These errors led the First District to find a taking where none had occurred.

As regulatory takings law evolved under Florida and federal law, courts do not sever some property rights from the entire parcel and determine whether that segment was taken. Courts analyze the impact of a regulation on the parcel as a whole. The First District failed to apply this non-segmentation rule.

Under modern regulatory takings jurisprudence, courts created two categorical or *per se* takings test. A regulation that causes physical occupation or invasion is automatically a taking no matter how small the invasion. Likewise, a regulation that deprives a landowner of all beneficial use is a *per se* taking. The First District did not apply these tests or find a physical invasion or deprivation of all economically beneficial use. No categorical regulatory takings of their property occurred without a physical invasion or deprivation of all use of STBR members' property.

Where there is no categorical regulatory taking, courts apply the *Penn Central ad hoc* multi-factor balancing test. This test requires proof of: (1) the economic impact of the regulation on the property owner; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government invasion.

The First District should have but did not apply the *Penn Central ad hoc* test. If it had, the court could only have concluded that the Act did not unconstitutionally take STBR members' property rights. The STBR members did not prove either the Act's economic impact on their properties or how the Act deprived them of their investment-backed expectations. Nor should the court have found STBR had standing to bring this claim. Associations are without standing to bring as-applied takings claims on behalf of their members.

The Act is a valid exercise of the police power to restore and nourish beaches in critically eroded areas of the State with only minimal impact on property owners. For all practical purposes, the STBR members retain the same use and enjoyment of their entire property as they had prior to the Act. Nothing in this record suggests that prevention of erosion will do anything other than enhance the value of their property. Under the applicable as-applied *Penn Central ad hoc* analysis, the Act is clearly constitutional.

ARGUMENT

I. THE FIRST DISTRICT IMPROPERLY HELD THAT STBR MEMBERS' COMMON LAW RIPARIAN RIGHTS WERE CONSTITUTIONALLY TAKEN BY THE ACT WITHOUT CONDUCTING ANY ANALYSIS UNDER APPLICABLE REGULATORY TAKINGS TESTS.

The First District did not attempt to construe the Act in a manner that would render it constitutional. Instead, it failed to apply well-established regulatory takings tests and created a new *per se* takings rule for riparian rights. The result is a decision that deviates greatly from modern takings jurisprudence in order to invalidate legislation that is of critical importance to the entire state.

A. The Legislature's Partial Elimination of Common Law Riparian Rights in Critically Eroded Beach Areas

The Legislature adopted the Act to establish a comprehensive regulatory program for beach restoration and nourishment in critically eroded shoreline areas. §161.088, Fla. Stat. Finding that "beach erosion is a serious menace to the economy and general welfare of the people of this state" which has reached "emergency proportions,"[2] the Legislature directed the Department to designate critically eroded beaches, and develop "a comprehensive long-term management plan for the restoration and maintenance of" those beaches. § 161.101(1) and 161(1).

Implementation of the plan requires the location of an erosion control line by the Trustees at the existing MHWL. After the ECL is located, the Trustees are required to record a survey of the line in the public records of the local government. §§ 161.161(3)-.181, Fla. Stat. Upon recording of the survey, the common law of riparian rights is modified as provided in Sections 161.191 and 161.201, Florida Statutes.

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[2] The Legislature also found that beach erosion is "detrimental to tourism, the state's major industry, further exposes the state's highly developed coastline to severe storm damage, and threatens beach related jobs," §161.091(3), Fla. Stat.

By virtue of legislative enactment, the common law of England applies in Florida. § 2.01, Fla. Stat. Accordingly, the common law may be repealed or modified by state statute so long as it does not violate the Constitution. *State v. Egan,* 287 So. 2d 1, 5 (Fla. 1973); *see also Board of Trustees of the Internal Improvement Trust Fund v. Sand Key,* 512 So. 2d 934, 937 (Fla. 1987) (noting legislative modifications to the common law of riparian rights). However, to change the common law, a statute "must speak in clear, unequivocal terms, for the presumption is that no change in the common law is intended unless the statute is explicit in this regard." *Carlile v. Game and Fresh Water Fish Commission*, 354 So. 2d 362, 364 (Fla. 1977); *Saunders v. Saunders*, 796 So. 2d 1253, 1254 (Fla. 1st DCA 2001) ("The common law is changed where a statute clearly, unequivocally, and specifically prescribes a different rule of law from a common law rule.").

The Act clearly and unequivocally changes the common law of riparian rights in critically eroded areas in Florida. Under the common law, riparian rights included the right to receive future accretions and relictions and the right to have the riparian property's contact with the water remain intact. *Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Associates, Ltd.*, 512 So. 2d 934, 936 (Fla. 1987). The Legislature's intent to change the common law with regard to these riparian rights in critically eroded areas is manifest in the express language of the Act.

Section 161.191(2), Florida Statutes, states in part:

> (2) Once the erosion control line along any segment of the shore line has been established in accordance with the provision of §§ 161.141-161.211, **the common law shall no longer operate to increase or decrease the proportions of any upland property lying landward of such line, either by accretion or erosion or by any other natural or artificial process**, except as provided in sections 161.211(2) and (3).[3]

(emphasis added). Section 161.201, Florida Statutes, then provides in part:

> Any upland owner or lessee who by operation of §§ 161.141-161.211 ceases to be holder of title to the mean high water line shall, nonetheless, **continue to be entitled to all common law riparian rights except as otherwise provided in s. 161.191(2). . . .**

(emphasis added). Thus, as both the Department and the First District concluded, the Act "clearly, unequivocably, and specifically" changes the common law of riparian rights by eliminating the riparian rights referenced above in critically eroded areas.

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[3] Sections 161.211(2) and (3), Florida Statutes, provide for cancellation of the erosion control line and the changes in the common law under certain conditions.

If the Act's regulatory scheme results in a taking of common law riparian property rights, the taking is regulatory in nature. Therefore, the regulatory takings tests formulated by the United States Supreme Court and this Court must be applied.

B. The Florida and Federal Tests For Determining Regulatory Takings

The Takings Clause of the Fifth Amendment to the United States Constitution provides: "nor shall private property be taken for public use, without just compensation." U.S. Const., Amend. V. Florida's Constitution includes a similar limitation: "No private property shall be taken except for a public purpose and with full compensation."[4] Art. X, § 6(a), Fla. Const. The Takings Clause "is designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Central Transp. Co. v. City of N.Y.*, 438 U.S. 104 (1978). As evidenced by numerous Florida takings cases, Florida courts generally interpret the State's Takings Clause in a manner consistent with the United States Supreme Court's interpretation of the counterpart federal Takings Clause.

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[4] The federal Takings Clause is applicable to the States through the Fourteenth Amendment. *Dolan v. City of Tigar*, 512 U.S. 374, 383 (1994).

Under both Takings Clauses, a regulation may go so far as to constitute an unlawful taking of private property. *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922); *Graham v. Estuary Properties*, 399 So. 2d 1374, 1380-81 (1981). The courts have devised various tests for determining when a regulation goes too far. These tests include the non-segmentation rule, two categorical tests, and one *ad hoc* balancing test.

1. The Non-Segmentation Or Parcel As A Whole Rule

Unless a regulation causes a physical invasion or occupation, a regulatory takings analysis always focuses on "the interference with rights in the parcel as a whole . . ." *Penn Central Trans. Co. v. City of New York*, 438 U.S. 104, 130-31 (1978). Under this rule, also known as the non-segmentation rule, the property is not divided into "discrete segments," but rather it is examined as a whole. *Id.* The United States Supreme Court recently reaffirmed this rule:

> Takings' jurisprudence ***does not divide a single parcel into discrete segments*** and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a takings, ***this Court focuses rather*** both on the character of the action and on the nature and extent of the interference with rights ***in the parcel as a whole . . .***

Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 327 (2002) (emphasis added) (quoting *Penn Central*, 438 U.S. at 130-31).

Florida courts have consistently recognized and applied the non-segmentation rule. *See, e.g., Palm Beach County v. Wright,* 641 So. 2d 50, 54 (Fla. 1994) (quoting *Penn Central*'s statement of the non-segmentation rule.); *State Department of Environmental Regulation v. MacKay,* 544 So. 2d 1065, 1066 (Fla. 3d DCA 1989) (citing *Penn Central*); *State Department of Environmental Regulation v. Schindler,* 604 So. 2d 565, 568 (Fla. 2d DCA 1992) (citing the non-segmentation rule); *Florida Game and Fresh Water Fish Commission v. Flotilla, Inc.*, 636 So. 2d 761, 765 (Fla. 2d DCA 1994) (citing *Penn Central*).

Further, under this rule, the nature of the segmentation is immaterial. In regulatory takings analyses, property will not be conceptually severed, physically, temporally, or functionally. *Tahoe-Sierra,* 535 U.S. at 318. For example, physically, neither the air space, *Penn Central*, 438 U.S. at 130-31, nor subsurface rights, *Keystone Bituminous Coal*, 480 U.S. 470, 498-99 (1987), nor a portion of the land surface, *Graham v. Estuary Properties,* 399 So. 2d at 1382, will be severed from the remainder of the parcel. Functionally, a particular use of property that has been prohibited will not be severed from other permitted uses, *Andrus v. Allard*, 444 U.S. 51 (1979). Temporally, a segment of time, such as a three-year moratorium, will not be conceptually severed from

the remainder of a fee simple estate, *Tahoe-Sierra*, 535 U.S. at 331.

To illustrate, in *Florida Game and Fresh Water Fish Commission v. Flotilla, Inc.*, 636 So. 2d 761 (Fla. 2d DCA 1994), a landowner owned 173 acres of undeveloped property. As a condition of development approval, the landowner was required to set aside approximately 43 acres as habitat preserves to protect endangered eagles. In the landowner's inverse condemnation claim, the trial court segmented the 48 acres and determined that they had been unlawfully taken. The Second District ruled that the trial court committed error: "Prohibition of development on certain portions of a tract does not, however, amount to an unconstitutional takings." *Id.* at 765. Citing *Penn Central,* the court concluded that "[b]ecause the property as a whole retained an economic life, we cannot agree that the land use restrictions are compensable." *Id.*

2. Categorical or *Per Se* Takings Tests

The Supreme Court has recognized "at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint." *Lucas*, 505 U.S. at 1015. The first includes actions that result in a physical "invasion" of private property. *Id.* The second includes regulatory actions that deny "all economically beneficial or productive use of land." *Id.*

Regulations which violate these tests result in *per se* takings.

a) The *Loretto* physical occupation test

The Supreme Court established this categorical or *per se* test in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 430 (1982). There, a New York regulation required a landlord to permit a cable television company to install its cable facilities upon appellant's roof and the side of her building. The Court concluded "that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve" and no matter how small the invasion. *Id.* at 426.

The Supreme Court has continued to adhere to this principle. In *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002), the court stated:

> When the government ***physically takes possession*** of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof.

Id. at 322 (citations omitted) (emphasis added).

This Court and other Florida courts have followed the *Loretto* physical invasion test to determine if there is a categorical or *per se* taking. *Storer*

Cable T.V., Inc. v. Summerwinds Apartments Associates, Ltd., 493 So. 2d 417, 419 (Fla. 1986); *Certain Interested Underwriters at Lloyd's London v. City of St. Petersburg*, 864 So. 2d 1145, 1148 (Fla. 2d DCA 2003).

b) The *Lucas* deprivation of all economically beneficial use test

The second categorical or *per se* takings test was adopted by the Supreme Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). The South Carolina legislature enacted a statute which prohibited the petitioner from building any permanent habitable structures on his two barrier island lots. 505 U.S. at 1003. Lucas brought suit in state court claiming that the legislation effected a taking requiring compensation. *Id.* at 1009. The trial court agreed, finding that Lucas's two beachfront lots were rendered valueless by the legislation's ban on construction.

The Supreme Court in *Lucas* found the state statute unconstitutional on its face. It acknowledged the recognition in its takings jurisprudence of at least two forms of regulatory action which require compensation without a usual case-specific inquiry into the public interest advanced in support of the restraint: (1) where the regulation compels the property owner to suffer a physical invasion, or (2) where the regulation "denies all economically beneficial or productive use of land." *Lucas*, 505 U.S. at 1015. The

Court explained that "when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is to leave his property economically idle, he has suffered a taking." *Id.* at 1019.

3. The *Penn Central Ad Hoc* Takings Test

In cases where there is no categorical or *per se* taking, the courts apply the *Penn Central ad hoc* multi-factor balancing test. *Lucas*, 505 U.S. at 1019-20, n. 8. In *Penn Central*, the Supreme Court described this test as an essentially *ad hoc*, factual inquiry which evaluates several factors. The court identified three factors of particular significance: (1) the economic impact of the regulation on the property owner; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government invasion. *Penn Central*, 438 U.S. at 124.

The Supreme Court in *Tahoe-Sierra* reaffirmed that the *Penn Central* test provides the proper analytical framework for a takings claim when a land use regulation does not result in a categorical or *per se* taking. *Tahoe-Sierra*, 505 U.S. at 1019-20, n. 8. *See also Keshbro, Inc. v. City of Miami*, 801 So. 2d 864, 871, n. 12 (Fla. 2001). This Court has recognized and applied the *Penn Central ad hoc* test. *See Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374, 1380 (Fla. 1981) (identifying factors to be considered); *Palm Beach County v. Wright*, 641 So. 2d at 54.

C. The First District's Failure to Discuss or Apply Established Regulatory Takings Tests

The First District held "that as applied in this case, the Beach and Shore Preservation Act deprives the members of their constitutionally protected riparian rights without just compensation for the property taken." (Op:23). More specifically, the Court held that elimination of only two of the bundle of riparian rights without compensation was an unconstitutional taking. (Op:18, 22).

In reaching this conclusion, the First District did not discuss or apply any of the established regulatory takings test. The Court did not consider or determine whether the Act resulted in a physical occupation or invasion of STBR members' property, *Loretto, supra*; it did not consider or determine whether the Act deprived the members of all economically beneficial use of their property, *Lucas*, *supra*; and it did apply or analyze the Act's impact under the *Penn Central ad hoc* multi-factor balancing test. Not surprisingly, therefore, the First District cited no regulatory takings cases in its decision.

Instead, the court's holding is based on the following flawed reasoning:

(1) Riparian rights are property rights that cannot be taken without just compensation (Op:15);

(2) Common law riparian rights include the right to receive future accretions

and relictions to the property and to have the property's contact with the water remain intact (Op:18);

(3) As applied, the Act eliminates these two common law riparian rights (Op:18);

(4) The Act's attempted "reservation" of riparian rights is legally invalid (Op:23); and

(5) These riparian rights were eliminated "without an eminent domain proceeding as required by Section 161.141." (Op:18).

Although decisions from this Court and the district courts of appeal refer to riparian rights as property rights which may not be taken without just compensation, these cases are factually distinguishable and did not involve regulatory takings. These decisions were either rendered, or relied on cases decided, long before the development of modern regulatory takings jurisprudence. With one exception, these cases do not discuss the tests courts should employ to determine whether a regulatory taking of property occurred without just compensation.

The First District cited four of these cases. *Thiesen v. Gulf, F. & A. Ry. Co.*, 78 So. 491 (Fla. 1918), involved an act which authorized the City of Pensacola to convey the submerged land between the high and low water marks to a private railroad company which then filled in the submerged lands and constructed railroad tracks across the filled in land, thereby depriving the riparian landowner of his

common law right of access to the water. *Id.* at 491, 505, 507. In holding that the railroad company had deprived the riparian landowner of his right of access to the water, the court observed that a riparian owner's common law riparian rights "constituted property of which he cannot be deprived without just compensation." *Id.* at 506. This case did not involve a regulatory taking nor did the court discuss the test to be applied to an alleged regulatory taking of riparian rights.

Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Associates-Ltd., 512 So. 2d 934 (Fla. 1987), also did not involve a regulatory takings claim. It decided a dispute between the Trustees and the riparian landowner over title to **existing, already accreted lands**. The Trustees claimed that the accreted lands were created by the State's public beach renourishment program, and that title to these lands remained in the State under both common law and Section 161.051, Florida Statutes, because they had been created by the State. *Id.* at 934. In rejecting both the common law and statutory claims made by the Trustees, the Court, *in dicta*, noted that riparian rights are property rights which may not be taken without just compensation. *Id.* at 936.

Lee County v. Kiesel, 705 So. 2d 1013 (Fla. 2d DCA 1998), involved a physical taking. The court held that the construction of a bridge on adjacent property physically and substantially obstructed the Kiesel's riparian right of view. *Id.* at 1014. Significantly, while

rejecting the County's argument that Kiesel was entitled to compensation only if the bridge "deprived them of substantially all beneficial use of their property," the *Kiesel* court noted that this takings test "would apply if this case involved a 'regulatory taking.'" *Id.* at 1015.

Kendry v. State Road Dep't, 213 So. 2d 23 (Fla. 4th DCA 1968), also did not involve a regulatory taking, and it does not discuss the analytical framework to be used in a regulatory takings claim. Rather, it involved the issue of whether a complaint should have been dismissed for failure to state a cause of action. The court held that the complaint should not have been dismissed because its allegations that the state road department filled submerged lands in the Indian River adjacent to plaintiff's land were sufficient "to show a complete appropriation of the plaintiff's riparian rights and thus a taking without just compensation." *Id.* at 28.

The First District also held that the preservation of common law rights in Section 161.201, Florida Statutes, cannot save the Act. Citing *Belvedere Dev. Corp. v. Department of Transportation*, 476 So. 2d 649 (Fla. 1985), the court ruled "that the riparian rights cannot be constitutionally reserved to the land-owners." (Op1:23). Thus, according to the First District, because the statutory reservation is legally invalid, the Act, as applied, deprives the STBR members of riparian rights.

The First District's reliance on *Belvedere* is misplaced. *Belvedere* involved a condemnation action in which the Department of Transportation took upland property by eminent domain, but attempted to "reserve" the riparian rights to the landowner in order to avoid paying full compensation to the landowner. This Court expressly declined to hold "that riparian rights are never severable from the riparian lands," but did hold, "in the context of condemnation of property . . . that the act of condemning a landowner's uplands without compensating the owner for riparian property rights was an unconstitutional taking." *Id.* at 652. Obviously, the instant case does not involve an effort by the State to condemn the uplands of STBR members without paying them for their riparian rights. Indeed, the very purpose of Section 161.201 is to preserve not only all of an owner's upland property but also all of the upland owner's riparian rights, except the right to future accretions or relictions.

The First District's misapplication of *Belvedere*, when combined with its misinterpretation of Section 161.141, Florida Statutes, levels a potentially fatal blow to the Act. Based on its interpretation of Section 161.141,[5] the court concludes that the riparian rights

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[5] Section 161.141, Florida Statute, as properly interpreted in the context of the entire Act, is intended to require eminent domain if the state actually physically appropriates upland property. There has been no such physical appropriation in this case.

must be taken through eminent domain proceedings. (Op:18). Based on its misreading of *Belvedere*, moreover, the Court ruled that riparian rights cannot be severed from the uplands absent the upland owner's agreement. (Op:22). Thus, the Court has held in effect that the only way for the State to extinguish lawfully the riparian rights of accretion and reliction in critically eroded shoreline areas is to condemn all of the riparian upland properties in their entirety. The cost of such an endeavor is likely to be financially prohibitive. This dire result will be avoided if the appropriate regulatory takings analysis is applied in this case.

The First District should have analyzed STBR's takings claim as a regulatory taking. *See Lee County v. Kiesel*, 705 So. 2d at 1015. *See also R. W. Docks & Slips v. State of Wisconsin*, 628 N.W. 2d 781, 789-90 (Wis. 2001) (holding that a takings claim based on interference with the riparian right of access is subject to the *Penn Central ad hoc* test). As demonstrated below, if the First District had conducted the appropriate analysis, it would have concluded that there was no unconstitutional taking in this case.

II. THE ACT DOES NOT UNCONSTITUTIONALLY TAKE THE PROPERTY RIGHTS OF STBR MEMBERS.

Applying the legal principles discussed above, the First District legally erred when it held the Act unconstitutional. The Court erroneously concluded

that two riparian rights can be segmented from the "parcel as a whole" to determine whether a taking occurred. The Court failed to recognize that there has been no physical invasion, *a la Loretto* [sic], or deprivation of all economically beneficial use, *a la Lucas*, and that the *Penn Central ad hoc* test must be applied. If the First District had applied the appropriate regulatory takings tests, it could have only determined that the Act is a reasonable regulation of property rights that does not result in a taking of the STBR members' property rights.

A. No Physical Invasion or Occupation of Property

The Act as applied has not caused a physical invasion or occupation of the property of STBR members, and the First District made no such finding. Although the Act eliminates the landowner's right to any additional upland property that may arise from future accretion or reliction, this involves property that has not yet come into existence, and its future existence is hugely speculative. Thus, the State cannot physically invade or occupy something that does not exist. The idea that the Act physically invades property that does not yet exist and may never exist, *i.e.*, land created by future accretion or reliction, cannot seriously be entertained. No taking has occurred under the *Loretta per se* test.

B. The Subject Riparian Rights Cannot Be Separated From the Parcel As A Whole To Determine Whether There Has Been A Taking

As discussed above, in determining whether there has been a taking of the STBR members' property, each parcel of property must be considered as a whole where there has been no physical occupation or invasion of the property. "Petitioners' 'conceptual severance' argument is unavailing because it ignores *Penn Central*'s admonition that in regulatory takings cases we must focus on 'the parcel as a whole.'" *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. at 331. Thus, the property of each of the STBR members must be evaluated as a whole, including the riparian rights, which are only one of several sticks in the entire bundle of property rights.

The First District violated the non-segmentation rule and focused solely on two riparian rights, failing to view the parcel as a whole. Moreover, assuming the riparian rights could be severed and treated as the denominator for the takings analysis, the First District conceptually severed only two of those rights instead of considering the entire bundle of riparian rights. In addition to the right of accretion and reliction, common law riparian rights include the right to general use of the water adjacent to the property; to wharf out to navigability; access to navigable waters; the right to an unobstructed view

of the water; and rights of ingress, egress, boating, bathing, and fishing.

Ironically, the First District's severance of the two riparian rights for its takings analysis is inconsistent with its reliance on *Belvedere Dev. Corp. v. Department of Transp., Div. of Admin.*, 476 So. 2d 649, 652 (Fla. 1985), to justify its conclusion that riparian rights cannot be severed and reserved to the landowner to avoid a taking. Like STBR in the court below, the First District contends that the riparian rights can be severed for one purpose but not for another.

The result of the First District's departure from established takings jurisprudence is the creation of new *per se* takings rule for riparian rights. There is no compelling reason why these rights should be treated any differently than any other stick in the bundle of property rights.

C. No Deprivation of All Economically Beneficial Use

The *Lucas per se* takings test is obviously not satisfied in this case. STBR members have not been deprived of all economically beneficial use of their property; the First District made no such finding. They retain not only economically beneficial uses of their upland property but also all riparian rights except the two eliminated by the Act. Thus, because neither the *Loretta* or *Lucas per se* takings tests apply, the *Penn Central ad hoc* test is the proper

framework for the takings analysis. *Tahoe-Sierra*, 535 U.S. at 331.

D. No Facial Taking

As earlier discussed, a regulation may be challenged as a facial or an as-applied taking. A facial challenge contends that the regulation on its face, as enacted, constitutes a taking. *Glisson v. Alachua County*, 558 So. 2d 1030, 1036 (Fla. 1st DCA 1990); *Keystone Bituminous Coal v. DeBenedictis*, 480 U.S. at 493. The test in a facial takings claim is whether the regulation, as enacted, "denies an owner economically viable use of his land." *Id.* at 495. An as-applied challenge, on the other hand, evaluates the impacts of the application of a regulation on a particular parcel of land. *Glisson v. Alachua County*, 558 So. 2d 1030, 1036 (Fla. 1st DCA 1990); *Keystone Bituminous Coal Ass'n v. DeBenedictus* [sic], 480 U.S. at 493.

The First District accepted STBR's contention that it was asserting an as-applied claim and treated it as such. Thus, if the court's characterization of the claim is correct, the facial takings test is not applicable.

Arguably, however, STBR's claim is a facial challenge. In its Initial Brief in the First District, STBR argued:

> The unconstitutional application of the Act by the Final Order should not be allowed to hide behind the unconstitutional Act. If the

> Act is unconstitutional because it takes riparian rights, then it must follow that a permit issued pursuant to that Act results in an unconstitutional taking.
>
> and
>
> If the statute is unconstitutional, the [Permit] is as well.

(A:12, 23). Indeed, in the very brief DOAH hearing, STBR presented its case as *if* it were a facial challenge. For example, no evidence was presented to establish the reasonable investment expectations of the STBR members or the economic impact of the Act on their individual properties. (T:147-187).

Nevertheless, STBR has postured its claim as an as-applied challenge. No doubt this is because it could not possibly satisfy the facial takings test. The STBR members have clearly not been deprived of all economically beneficial use of their properties because they have the use of their upland property and retain most of their common law riparian rights.

E. No As-Applied Taking Under Penn Central

The *Penn Central ad hoc* test focuses on three factors of particular significance: (1) the economic impact of the regulation on the property owner, (2) the extent to which the regulation has interfered with distinct investment backed expectations, and (3) the character of the government invasion. *Penn Central*, 438 U.S. at 124; *see also Graham v. Estuary Properties*, 399 So. 2d at 1380.

Regarding the economic impact factor, the STBR members must establish "a serious financial loss from the regulatory imposition." *Leon County v. Gluesenkamp*, 873 So. 2d 460, 467 (Fla. 1st DCA 2004). The focus is on the change in fair market value of the property. In other words, the court must compare the value that has been taken from the property with the value that remains in the property. *Id.* at 467; *Keystone Bituminous Coal Ass'n*, 480 U.S. at 497. There is not one shred of evidence in this record to establish any change in the market value of STBR members' property or, for that matter, any other economic impact on their property.

Moreover, the right to future accretion and reliction is purely speculative. No record evidence shows that accretion or reliction will or is even likely to occur. The record evidence proves only that the property has severely eroded. In the absence of a beach nourishment project, erosion is likely to continue. The right to future accretions and relictions is so speculative that their loss is unlikely to have any significant impact on STBR members' property. See *Coastal Petroleum v. Chiles*, 701 So. 2d 619, 625 (Fla. 1st DCA 1997) (holding that right to royalties to oil and gas in offshore areas if the State leased such areas to parties who might drill for oil and gas was too speculative to be protected by inverse condemnation action.)

As the party bearing the burden of showing the Act was unconstitutional as applied, the STBR members should have rendered evidence of the

economic impact of the Act on their property. They failed to carry this burden.

Similarly, regarding the second *Penn Central* factor, the STBR members failed to sustain their burden of proving the extent to which the regulation has interfered with their distinct investment-backed expectations. The record is devoid of evidence on this important factor.

Finally, the *Penn Central ad hoc* test requires the court to review the character of the governmental action which "is critical in takings analysis." *Keystone*, 480 U.S. at 488. With respect to this factor, "[a] taking may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S. at 124.

The governmental action in this case does not physically invade private property and is clearly an exercise of the police power to prevent public harm and promote the common good. In the exercise of its constitutional duty and power to conserve and protect the state's natural resources and scenic beauty,[6] the

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[6] Article II, Section 7 of the Florida Constitution provides, in pertinent part:

(a) It should be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provisions

(Continued on following page)

Legislature adopted the Act to abate beach erosion, "a menace to the economy and general welfare of the people" which is of "emergency proportions." Fla. Stat. § 161.088. Abating this critical problem is undeniably a legitimate public purpose, and the Act's comprehensive plan to achieve that purpose in critically eroded areas is rationally related to that purpose. *See Haire v. Florida Dep't of Agriculture and Consumer Serv.*, 870 So. 2d 774, 782 (Fla. 2004). Thus, the Act is a valid exercise of the police power and is not a taking because STBR members still have reasonable uses of their property. *Glisson v. Alachua County*, 558 So. 2d 1030, 1035 (Fla. 1st DCA 1990).

Additionally, the Act is designed to have minimal impact on affected private landowners. It applies only in designated critically eroded areas. The landowners in these areas retain all of their riparian rights except the highly speculative rights of accretion and reliction. They will be primary beneficiaries of the Act because beach erosion will be abated on their properties and their beaches will be restored and maintained. This enhancement in value is likely to more than offset any decrease caused by the loss of only two of their riparian rights. *See Palm Beach County v. Wright*, 641 So. 2d at 51-52 (in rejecting a regulatory takings challenge to designation of public transportation corridors over private property, this

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shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise and for the conservation and protection of natural resources.

Court noted that those landowners closest to the corridors were likely to benefit the most). Because the Act does not interfere with landowners' property in a substantial way, it does not amount to a taking and is a lawful exercise of the police power. *Anhoco Corp. v. Dade County*, 144 So. 2d 793, 798 (Fla. 1962).

Finally, the Act itself reflects that it is not intended to authorize either physical or regulatory takings without compensation. If implementation of the Act requires actual physical appropriation of private property, Section 161.141, Florida Statutes, provides that the taking must be accomplished by eminent domain proceedings. If there is an alleged regulatory taking, Section 161.212, Florida Statutes, provides landowners with a statutory action for compensation in circuit court in addition to their constitutional right to file an inverse condemnation action. STBR and its members have not pursued these remedies and, therefore, have not been denied compensation.[7]

Accordingly, when the character of the governmental action is [sic] this case is considered along with the lack of any evidence of economic impact or interference with reasonable investment-backed expectations, it is clear that under the applicable

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[7] *See Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 195 (1985) (No constitutional violation occurs under Fifth Amendment "until just compensation has been denied.")

Penn Central ad hoc test no regulatory taking has occurred.

F. Because the Act Is Constitutional, The City and County Need Not Provide Evidence Of Sufficient Upland Interest

The First District concluded that Section 161.191(2), Florida Statutes, deprives STBR's members of certain constitutionally protected riparian rights without just compensation. Based on that finding, the First District held that: "because those riparian rights have been infringed, contrary to the Department's ruling, satisfactory evidence of sufficient upland interest required by rule 18-21.004(3) must be provided." (Op1:18). The First District Court remanded the case to the Department to provide satisfactory evidence of sufficient upland interest pursuant to Rule 18-21.004(3)(b), Florida Administrative Code.

Subsequently, the First District certified the following question of great public importance to this Court:

> Has Part I of Chapter 161, Florida Statutes (2005), referred to as the Beach and Shore Preservation Act, been unconstitutionally applies so as to deprive the members of Stop the Beach Renourishment, Inc. of their riparian rights without just compensation. for the property taken, so that the exception provided in Florida Administrative Code Rule 18-21.004(3), exempting satisfactory

> evidence of sufficient upland interest if the activities do not unreasonable infringe on riparian rights, does not apply?

Because the Act is constitutional, the Act does not infringe, unreasonably or otherwise, on riparian rights. STBR presented no evidence in the administrative hearing to demonstrate any other basis for a determination that riparian rights are unreasonably infringed upon. Therefore, the City and County are exempt pursuant to Rule 18-21 004(3)[8], Florida Administrative Code, from the requirement to provide satisfactory evidence of sufficient upland interest.

III. THE FIRST DISTRICT INCORRECTLY HELD THAT STBR HAS ASSOCIATIONAL STANDING TO BRING AN AS-APPLIED TAKINGS CHALLENGE TO THE ACT.

Assuming STBR has brought an as-applied takings challenge, the First District incorrectly held that STBR had associational standing to do so. As this Court held in *Florida Home Builders Ass'n v. Dept. of Labor and Employment Sec.*, 412 So. 2d 351,

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[8] Arguably, the City and County are also exempt from providing evidence of sufficient upland interest under Rule 18-21.004(3), Florida Administrative Code, since that rule only applies to the acts of the permittees. The riparian rights affected by Section 161.191, Florida Statutes, are not affected by any actions of the City or County, but rather by the recordation of the ECL which is an act of the Trustees.

353 (Fla. 1982), an association has standing to bring suit on behalf of its members only when:

> (a) its members would otherwise have standing to sue in their own right;
>
> (b) the interests it seeks to protect are germane to the organization's purpose; and
>
> (c) **neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.**

In the First District, the City and County argued that STBR could not meet the third prong of the *Florida Home Builders'* associational standing test in an as-applied takings claim that is subject to the *Penn Central ad hoc* takings test. (B:9-10). The analysis under this test is not conducive to generalizations, but must focus on the specifics of each parcel of land. "[T]he takings analysis will depend on the facts of each individual parcel of land, including the length of time that the homeowner has owned the land, the investment-backed expectations of the homeowner, and the use that the homeowner desires for her property." *Id.* at 353 citing *Penn Central*, 438 U.S. at 124.

The First District, in peremptorily rejecting the City's and County's standing argument, relied solely on two federal cases: *Pennell v. City of San Jose*, 485 U.S. 1 (1988) and *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 342-45 (1977). Neither case supports the proposition that STBR has associational

standing to bring an as-applied takings claim. Pennell involved a ***facial*** takings claim which the Court expressly stated "does not require the participation of individual [members]" of the association. *Pennell*, 485 U.S. at 7 n. 3. In *Hunt*, which involved a constitutional challenge to a statute but not a takings claim, the Court held that the relief sought in that case did not require participation by individual members. *Hunt*, 432 U.S. at 344.

Further, while apparently no Florida court has addressed this precise issue, federal courts routinely deny associational standing in as-applied takings challenges.[9] *See*, e.g., *Greater Atlanta Home Builders Ass'n v. City of Atlanta*, 149 Fed. Appx. 846 (11th Cir. 2005) (associations lacked standing to bring their takings claims challenging a city's expenditure of development impact fees imposed on new development projects because the economic impact varied depending upon the economic circumstances of each of the associations' members, requiring the participation of those members); *Rent Stabilization Ass'n v. Dinkins*, 5 F.3d 591 (2d Cir. 1993) (association lacked standing to bring suit to obtain declaratory and injunctive relief from rent stabilization scheme where

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[9] These federal decisions are persuasive authority because this Court based its associational standing rule in *Florida Home Builders*, 412 So. 2d 353 (1982), on the federal associational standing rule enunciated in *Warth v. Seldin*, 422 So. 2d 490, 511 (1975) and *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

the individual participation of landlords was required to determine when a taking occurred).

In *Comm. for Reasonable Regulation of Lake Tahoe v. Tahoe Reg'l Planning Agency*, 365 F. Supp. 2d 1146, 1165 (D. Nev. 2005), the court acknowledged the general judicial consensus that an association lacks standing to assert an as-applied takings challenge under *Penn Central*. The court explained the reasoning behind this rule:

> Facial challenges by their very nature focus on the mere enactment of the statute or ordinance. This is distinct from an as applied challenge that will differ in application and analysis depending on the specifics of the person challenging the government action.

Id. at 1164.

The fact that STBR did not seek money damages does not alter this analysis. The *Comm. for Reasonable Regulation* court recognized that seeking equitable relief does not *per se* overcome the third prong of associational standing. *Id.* at 1163 citing *Hunt*, 432 U.S. at 343 (stating that associational standing is only proper "if neither **the claim asserted** nor the relief requested requires the participation of individual members in the lawsuit") (emphasis added).

Accordingly, the First District's holding that STBR had standing to bring an as-applied takings challenge to the Department Permit and/or the Act is erroneous and should be reversed.

CONCLUSION

For all the foregoing reasons, this Court should answer the certified question in the negative. The Act is constitutional, facially and as-applied. The First District failed to apply the proper regulatory takings analysis. The district court should have applied the *Penn Central ad hoc* takings test to the STBR members' property as a whole. Instead, the district court improperly severed the two riparian rights from the parcels as a whole and categorically held that these rights were unconstitutionally taken. If the court had applied the appropriate tests, it could have only correctly concluded that no unconstitutional taking has occurred.

Respectfully submitted,

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REPLY BRIEF

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In The Supreme Court of the United States

STOP THE BEACH RENOURISHMENT, INC.,

Petitioner,

v.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND, WALTON COUNTY, and CITY OF DESTIN,

Respondents.

On Petition for Writ of Certiorari to the Florida Supreme Court

REPLY TO BRIEFS IN OPPOSITION

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INTRODUCTION

Can a State Supreme Court replace constitutional rights with statutory rights without the payment of compensation or violating due process? Can a State Supreme Court approve the legislature's unilateral alteration of a property boundary in a private deed without violating due process?

The Briefs in Opposition filed by Respondents Walton County and City of Destin (collectively "City and County") and Respondents Florida Department of Environmental Protection and the Board of Trustees of the Internal Improvement Trust Fund (collectively "DEP") do nothing to address these two fundamental and elementary principles. Rather, Respondents' Briefs confuse the issues, argue the obvious, focus on the alleged "public good" done by the Beach and Shore Preservation Act, Chapter 161 of the Florida Statutes (2003) (hereinafter "Act"), and create new after-the-fact justifications for the Florida Supreme Court's actions. This Reply will correct those ill conceived notions.

1. The Florida Supreme Court's Opinion, Not the Act, Results in Judicial Taking.

A judicial taking occurs when the decision of the state court effects a "sudden change in state law, unpredictable in terms of the relevant precedents." *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967). One looks "not [to] what a State [court] says, or by what it intends, but by what it does." *Id.* at 297-98. Respondents, however, ignore this principle and

focus only on what the Florida Supreme Court says and not what it does.

When focusing on the Act, it is no surprise that one can seemingly conclude that it is "facially constitutional" given the Act contains a savings clause requiring eminent domain proceedings "[i]f an authorized beach restoration . . . project cannot reasonably be accomplished without the taking of private property." Fla. Stat. § 161.141 (2003).

It is the application of the Act's provisions (and non-application of the savings clause) by the Florida Supreme Court – and not the mere existence of the Act – that has resulted in a "sudden change in state law, unpredictable in terms of the relevant precedents." *Hughes*, 389 U.S. at 296-97.[1] Had the Florida Supreme Court applied the saving clause and required compensation for the constitutional rights taken by the state's application of the Act, there would not have been any change in the 100 years of precedent that hold littoral rights are "property rights that may be regulated by law, but may not be taken without just compensation and due process of law."[2]

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[1] Thus, Respondent's argument that the Act has been in existence for 35+ years and is not a "sudden" change in law misses the mark.

[2] *Brickell v. Trammell*, 82 So. 221, 227 (Fla. 1919); *accord Bd. of Trs. of the Internal Improvement Trust Fund v. Sand Key Assoc., Ltd.* (*Sand Key*), 512 So. 2d 934, 936 (Fla. 1987); *Belvedere Dev. Corp. v. Dep't of Transp.* (*Belvedere*), 476 So. 2d 649, 652 (Fla. 1985); *Florida. v. Fla. Nat'l Props., Inc.* (*Florida National Properties*), 338 So. 2d 13, 17 (Fla.

Instead, in order to allow the state to continue sponsoring beach nourishment projects, the Florida Supreme Court needed to avoid a holding that a taking of private property results from the manner in which such projects are conducted. Thus, based on these public policy reasons, the Florida Supreme Court redefined constitutional rights and employed a sham "balancing test" that strips individuals of 100 year old constitutional rights solely for the practical and economic convenience of the State.[3] Nothing could be more undemocratic and offensive to the notions of justice.[4]

2. All Littoral Rights Are "Vested" by Their Very Nature.

For this first time, the City and County argue that there is some distinction among the various littoral rights as if some are vested and others are

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1976); *Thiesen v. Gulf, Fla. & Ala. Ry.*, 78 So. 491, 507 (Fla. 1917); *Broward v. Mabry*, 50 So. 826, 830 (Fla. 1909).

[3] The Florida Supreme Court cited no law for this sham balancing test. *See* Appendix to Petition for Certiorari ("App.") at 26-28.

[4] "[T]he constitutional guarantee of compensation does not extend only to cases where the taking is cheap or easy. Indeed, the need for compensation is greatest where the loss is greatest. **If one must make a choice between the government's convenience and the citizen's constitutional rights, the conclusion should not be much in doubt."** *Palm Beach County v. Cove Club Investors Ltd.*, 734 So. 2d 379, 389 (Fla. 1999) (emphasis added) (quoting William B. Stoebuck, *Nontrespassory Takings in Eminent Domain*, 134-35 (1977)).

not.[5] One would expect to see case law cited for such a claim. This critical omission is not surprising given the Florida Supreme Court's clear holding:

> Riparian and littoral property rights consist not only of the right to use the water shared by the public, but include the following **vested** rights: (1) the right of access to the water, including the right to have the property's contact with the water remain intact . . . and (4) the right to receive accretions and relictions to the property.

Board of Trs. of the Internal Improvement Trust Fund v. Sand Key Assoc., Ltd. (*Sand Key*), 512 So. 2d 934, 936 (Fla. 1987).

Littoral rights, by their very nature, are vested to the littoral property.[6] Respondents' "vesting" argument attempts to drive an imaginary wedge of distinction into the littoral right to

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[5] Respondents' arguments have been anything but consistent. Respondents previously conceded littoral rights were taken by DEP's application of the Act but were not compensable. They now argue that no rights have been taken. Perhaps this is because the Florida Supreme Court has changed 100 years of law to achieve that result.

[6] *See Belvedere*, 476 So. 2d at 651 ("Riparian rights are property rights, incorporeal interests in real estate . . . ."). Thus, the City and County's attempt to draw some distinction among the rights in *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. (Haw.) 1985), *rev'd on procedural grounds*, 477 U.S. 902 (1986), is inapposite.

accretion by arguing the right to accretion only includes and protects past accretion that has created new lands, and does not protect or include future accretion that may create lands in the future. Thus, they argue, if new lands have not yet formed by accretion there is no "vested" right to receive those new lands in the future (as the right does not vest, apparently, until the land is created).

The littoral "right to accretion" has for 100 years included the right to past, present, and future alluvion or accretion.[7] Respondents' attempt to draw a distinction is expressly contradicted by Florida Supreme Court precedent. In *Florida National Properties* the Court could not have been clearer on two holdings. *Florida v. Fla. Nat'l Props., Inc.* (*Florida National Properties*), 338 So. 2d 13 (Fla. 1976). First, "the [littoral] right to future alluvion or accretion" cannot be taken without compensation under either the state or federal constitutions. *Id.* at 17. Second, a statutory scheme that authorizes "[a]n inflexible meander demarcation line [between submerged state property and upland property] would not comply with the . . . Federal or State Constitutions." *Id.* at 19.

The City and County, unable to distinguish the holdings in *Florida National Properties*, makes perhaps the most preposterous argument to date.

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[7] "Alluvion" is the new sand that accumulates on the beach while the term "accretion" denotes the act of the new sand accumulating on the beach. *See* Mark S. Dennison, *Proof of Accretion or Avulsion in Title Boundary Disputes Over Additions to Riparian Land*, 73 Am. Jur. Proof of Facts 3d 167, § 2, at p. 180 (2003).

The City and County assert that the holdings from *Florida National Properties* quoted by the Petitioner in its Petition for Certiorari[8] are not the holdings of the Florida Supreme Court; rather "the trial court . . . issued the rulings" and the Florida "Supreme Court simply set forth the trial court's judgment in its opinion." *See City and County Brief*, p. 17.

This argument is unavailing given that the Florida Supreme Court – in its own words – states:

> **we conclude that the trial court correctly held** the efforts of the State to fix specific and permanent boundaries were . . . unconstitutional. . . . **[W]e also agree with the lower court's conclusion** that the statute . . . is invalid in its entirety.
>
> * * *
>
> **[W]e sustain the learned trial court**

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[8] One quote from *Florida National Properties* being:

> By requiring the establishment of a fixed boundary line between sovereignty bottom lands and Plaintiff's riparian lands, Fla.Stat. s 253.151 . . . constitutes a taking of Plaintiff's property, **including its riparian rights to future alluvion or accretion,** without compensation in violation to the due process clause of the Fourteenth Amendment of the United States Constitution and the due process clause of . . . the Florida Constitution.

Fla. Nat'l Props., 338 So. 2d at 17 (emphasis added).

> in holding Section 253.151, Florida Statutes, unconstitutional in its entirety. An inflexible meander demarcation line would not comply with the spirit or letter of our Federal or State Constitutions nor meet present requirements of society.

Id. at 18-19 (emphasis added).

While the Supreme Court in *Florida National Properties* affirms the trial court judgment *in toto*, it does not disagree with any portion of the trial court's ruling, and does not provide any alternative reasoning. *Id.*[9] For the City and County to say the Florida Supreme Court did not adopt the "learned trial court's" reasoning is baffling.

Thus, the attempt by the City and the County to distinguish between "vested" littoral rights and "unvested" littoral rights and avoid the Florida Supreme Court's holding in *Florida National Properties* is simply a serendipitous attempt to justify the Florida Supreme Court's overhauling of 100 years of precedent.

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[9] Possibly more baffling is DEP's statement that *Florida National Properties* was decided based on "federal precedent contrary to state law" and has "very little precedential value" as a result. *See DEP Brief*, p. 14. DEP's statement is simply false and misleading as the *Florida National Properties* Court expressly held that the statute in that case violated both the federal and state constitutions and so stated on three different occasions. *Fla. Nat'l Props.*, 338 So. 2d at 17-19.

3. Petitioner's Members Have Far Less Than They Did Before Application of the Act.

The Respondents attempt to portray the Act and the beach nourishment as a "boom" to the property owner providing the owner with "protection from erosion" and claim the owner is better off with the Act than without it. This argument distorts the facts and mischaracterizes the effect of the Act on the Petitioner's members.

First, Respondents claim that any suggestion of accretion occurring on the Petitioner's members' property would be speculative given that the *Respondents* have labeled the members' beach "critically eroded." Clashing directly with this convenient label are conclusions from Respondents' own coastal engineers that find the members' beach is an accreting beach:

> Net longshore transport rates . . . **reveal an accretive trend. Taylor Engineering, Inc. (2003) concludes that the project area beaches possess the natural ability, as indicated by the accretive longshore sediment transport trend, to recover absent storms** . . . .

See ROA Joint Exhibit 1, Environmental Assessment, Walton County/Destin Beach

Restoration Project, 2003, p. 12-13 (emphasis added).[10]

Thus, absent storms, the Petitioner's members' beach is an accreting beach. It is important to note that washout of sand from storm events is avulsion – not erosion – and does not change the Mean High Water Line ("MHWL"). *See Bryant v. Peppe*, 238 So. 2d 836, 838 (Fla. 1970).

Second, the Act has a profound effect on the property. No longer does the property owner own all upland property to the MHWL with the exclusive right to use that property.[11] Rather, after the project, there will be a 60-120 foot wide publicly owned beach between the property of the upland owners and the water.[12] The conversion of the property in question from a private beach to a public beach and from a water front to a water view property and its effect on the value of ones property needs no explanation.[13]

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[10] Given this evidence, it is irresponsible for DEP to represent to this Court that "this case involves a shoreline at significant risk of eroding, not accreting" without citing to any evidence in the record. *See DEP Brief*, n.5.

[11] *Board of Trustees v. Medeira Beach Nominee, Inc.*, 272 So. 2d 209, 214 (Fla. 2d DCA 1973) (holding beachfront owners "have the exclusive right of access over their own property to the water").

[12] The State suffers no "burden." Rather, the Act is the cheapest method for the State to commandeer a private beach and convert it into a public beach.

[13] In *Thiesen*, the Florida Supreme Court stated:

Third, Respondents misrepresent that landowners are guaranteed a constantly renourished beach that protects their property from erosion and if the State does not maintain the beach, such that the water line recedes landward of the ECL, all rights return to the "status quo ante." *See DEP Brief*, p. 3-4, n.4.

This broad sweeping statement by DEP (which quotes the Florida Supreme Court's majority opinion) could not misrepresent the process of cancellation of the ECL under the Act any more. Under Section 161.211, Florida Statutes, the cancellation of the ECL is anything but automatic as the Respondents' (and Florida Supreme Court) recklessly suggest. Rather, under the Act, there is no guarantee that the ECL will ever be cancelled and the "status quo ante" returned.[14]

> The fronting of a lot upon a navigable stream or bay often constitutes its chief value and desirability . . . . [Littoral rights] and the enjoyment of the privileges of the waters incident to ownership of the bordering land would not, in many cases, be exchanged for the price of an inland lot in the same vicinity. In many cases, doubtless, the [littoral] rights . . . were the principal, if not sole, inducement leading to its purchase by one and the reason for the price charged by the seller.

Thiesen, 78 So. at 507.

[14] Section 161.211(3), Florida Statutes (emphasis added), provides that the State may cancel the ECL or "upon receipt of a written petition signed by the owners or lessees of a majority of the lineal feet of riparian property lying

Finally, the Respondents' proffered justification that the Act's replacement of constitutional littoral rights with statutory rights, along with some illusory guarantee against the risk of erosion somehow cures a constitutional taking is facially indefensible. It is precisely this "swap" of rights that is problematic.[15]

4. Right of Contact with the MHWL.

The City and County attempt to create a new argument that contact with MHWL is not a right and "has no significance beyond giving property a [littoral] character." *See City and County Brief*, p. 20. And since the Act provides the upland properties with "littoral character" via statutory rights, the now-landlocked property owners are still "littoral" owners. This logic – claiming that the property in question is land locked and littoral all at the same

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within the erosion control project, shall direct or request" shall restore the beach within one year or thereafter cause the ECL to be cancelled.

[15] Contrary to the City and County's argument, the Constitution expressly guarantees the protection of free speech, equal protection, **and** property. *See City and County Brief*, p. 25. The only difference between these rights is that the United States Supreme Court defines the scope of free speech and equal protection and the state courts define "property." Once property is defined, it is protected by the United States Constitution. The Florida Supreme Court has for 100 years defined littoral rights as property with all attendant constitutional protections. Having done so, the Florida Supreme Court (or the legislature) cannot now redefine littoral rights to no longer be constitutional property.

time – is self-contradicting. It is, therefore, not surprising that the City and County again fail to provide any legal authority for this claim.

The City and County fail to comprehend that property must border the MHWL to be littoral and by that sole fact the landowners possess constitutional littoral rights.[16] It is this 100 year old fundamental background principle of state law that the Florida Supreme Court has suddenly and unpredictably changed. Neither the Florida Supreme Court nor the City and County cite to any principle of state property law that has ever held that a parcel that does not touch the MHWL enjoys "littoral rights" or even "littoral characteristics." Rather they deceptively try to equate statutory rights to true littoral rights by calling both littoral rights. This attempt to camouflage a monumental departure from 100 years of background principles of state law is disingenuous.

CONCLUSION

The Florida Supreme Court's opinion is a product of judicial engineering to achieve a desired policy result. The State was not shy in arguing below that the appellate court's ruling, which found a taking occurred, would impose "unprecedented financial burdens on local governments" that would cripple the State's beach nourishment program.

Likewise, the Florida Supreme Court did not shy from delivering a result that achieved the

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[16] *See, e.g., Game and Fresh Water Fish Comm'n v. Lake Islands, Ltd.*, 407 So.2d 189, 192 (Fla. 1981).

desired policy objective as well as obliterating Petitioner's members' littoral rights in contravention of 100 years of state property law to the contrary. The Florida Supreme Court's bold ruling designed to achieve this obvious policy result – all while pretending not to change any law – is repulsive and repugnant to the notions of due process, fairness, and justice.

This case is the ideal vehicle for this Court to finally rein in activist state courts that continue to invoke non-existent rules of state substantive law to avoid takings claims by declaring no property rights ever existed. *See Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1207 (1994) (Scalia, J., and O'Connor, J., dissenting from denial of the petition for writ of certiorari). Accordingly, this Court should grant certiorari.

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JOINT APPENDIX

Supreme Court, U.S.
FILED
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No. 08-1151

In The Supreme Court of the United States

STOP THE BEACH RENOURISHMENT, INC.,

Petitioner,

v.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND, WALTON COUNTY, and CITY OF DESTIN,

Respondents.

On Writ Of Certiorari To The Florida Supreme Court

JOINT APPENDIX

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Florida Division of Administrative Hearings

Docket Sheet 04-2960

SAVE OUR BEACHES, INC., AND
STOP THE BEACH RENOURISHMENT, INC.
vs.
DEPARTMENT OF ENVIRONMENTAL PROTECTION,
CITY OF DESTIN, AND WALTON COUNTY

Date	Proceedings
09/20/05	(Proposed) Order Denying Motion for Stay filed.
07/28/05	(Agency) Final Order filed.
07/15/05	Petitioners' Exceptions to Recommended filed.
06/06/05	Respondents, Walton County and City of Destin's Joint Notice of Filing filed.
06/06/05	Petitioner Stop the Beach Renourishment, Inc.'s Response to First Set of Interrogatories from Respondent Walton County filed.
02/17/05	Respondent's Joint Pre-hearing Stipulation filed.
02/14/05	Petitioner's Pre-hearing Statement filed.
02/09/05	Petitioners' Response in Opposition to Respondents', Walton County and City of Destin, Joint Motion to Dismiss filed.
02/08/05	Respondents', Walton County and City of Destin, Joint Motion to Dismiss filed.
01/21/05	Order Dismissing Constitutional Issues.

02/19/05 Petitioners' Response in Opposition to Respondents', Walton County and City of Destin, Joint Motion to Dismiss Constitutional Issues filed.

01/11/05 Respondents', Walton County and City of Destin, Joint Motion to Dismiss Constitutional Issues filed.

12/13/04 Petitioner's Motion to Amend Petitions for Administrative Hearing filed.

09/27/04 Order Consolidating Cases. (consolidated cases are: 04-002960, 04-3261).

08/30/04 Joint Response to Initial Order (filed by Respondent via facsimile).

08/20/04 Consolidated Joint Coastal Permit and Sovereign Submerged Lands Authorization filed.

08/20/04 Petition for Formal Administrative Proceeding filed.

08/20/04 Initial Order.

Florida Division of Administrative Hearings

Docket Sheet 04-3261

STOP THE BEACH RENOURISHMENT, INC.

vs.

DEPARTMENT OF ENVIRONMENTAL PROTECTION AND BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND

Date	Proceedings
09/27/04	Order Consolidating Cases. (consolidated cases are: 04-002960, 04-3261).
09/17/04	Petition for Formal Administrative Proceedings (filed via facsimile).
09/15/04	Resolution filed.

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Case Number: 1D05-4086

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SAVE OUR BEACHES, INC. and Stop the Beach etc. vs. Florida Department of Environmental etc., et al.

Lower Tribunal Case(s): 04-1370

Date Docketed	Description
08/24/2005	Notice of Appeal Filed
09/29/2005	Motion To Stay
10/28/2005	Initial Brief on Merits
11/07/2005	Deny Stay – 52
11/14/2005	Motion For Rehearing
12/14/2005	Appellee's Answer Brief
12/14/2005	Appellee's Answer Brief
12/15/2005	Deny Rehearing of Order – 59
12/30/2005	Appellant's Reply Brief
02/15/2005	Oral Argument Date Set
04/28/2006	Reversed – Authored Opinion
05/15/2006	Motion For Rehearing
05/15/2006	Motion For Rehearing EN BANC
05/15/2006	Motion SUGGEST T/CERT. CAUSE T/SC
05/15/2006	Motion For Rehearing
05/15/2006	Motion For Rehearing EN BANC

05/15/2006	Motion SUGGEST T/CERT. CAUSE T/SC
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07/28/2006	RESPONSE
08/03/2006	Grant Motion Stay Mandate – 90c
08/03/2006	Grant Motion Stay Mandate – 90c

Florida Supreme Court Case Docket

Case Number: SC06-1447 – Closed

WALTON COUNTY, ET AL. vs. STOP THE BEACH RENOURISHMENT, INC., ET AL.

Lower Tribunal Case(s): 1D05-4086

Date Docketed	**Description**
07/18/2006	NOTICE – DISCRETIONARY JURIS (CERT GPI)
07/28/2006	JURIS INITIAL BRIEF
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10/23/2006	INITIAL BRIEF – MERITS
10/25/2006	AMICUS CURIAE INITIAL BRIEF – MERITS
10/26/2006	AMICUS CURIAE INITIAL BRIEF – MERITS
11/01/2006	AMICUS CURIAE INITIAL AMD BRIEF – MERITS
11/27/2006	AMICUS CURIAE ANSWER BRIEF – MERITS
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09/29/2008	DISP – QUASHED
10/14/2008	MOTION – REHEARING
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10/30/2008	RESPONSE
12/18/2008	DISP – REHEARING DY
03/02/2009	MANDATE

Florida Supreme Court Case Docket

Case Number: SC06-1449 - Closed

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, ETC. vs. STOP THE BEACH RENOURISHMENT, INC., ET AL.

Lower Tribunal Case(s): 1D05-4086

Date Docketed	**Description**
07/20/2006	NOTICE – DISCRETIONARY JURIS (CERT GPI)
08/07/2006	JURIS INITIAL AMD BRIEF
08/07/2006	APPENDIX (AMENDED)
08/11/2006	RESPONSE
09/21/2006	JURIS ANSWER BRIEF
09/25/2006	ORDER – JURIS ACCEPT/BRIEF SCHED (OA LATER DATE)
10/25/2006	AMICUS CURIAE INITIAL BRIEF – MERITS
10/25/2006	AMICUS CURIAE INITIAL BRIEF – MERITS
10/25/2006	INITIAL AMD BRIEF –MERITS
10/26/2006	AMICUS CURIAE INITIAL BRIEF – MERITS
11/01/2006	AMICUS CURIAE INITIAL AMD BRIEF – MERITS
11/22/2006	ANSWER BRIEF – MERITS

11/27/2006	AMICUS CURIAE ANSWER BRIEF – MERITS
11/29/2006	RECORD/TRANSCRIPT
11/29/2006	ANSWER AMD BRIEF – MERITS
12/06/2006	AMICUS CURIAE ANSWER BRIEF – MERITS
12/18/2006	REPLY BRIEF – MERITS
01/03/2007	ORDER – OA SCHED (PREV ACCEPTED)
03/05/2007	NOTICE – SUPPLEMENTAL AUTHORITY
04/19/2007	ORAL ARGUMENT HELD
05/16/2008	ORDER – CASE STYLE CHANGE
09/29/2008	DISP – QUASHED
10/14/2008	MOTION –REHEARING
10/29/2008	RESPONSE
12/18/2008	DISP – REHEARING DY
03/02/2008	MANDATE

STATE OF FLORIDA
DEPARTMENT OF
ENVIRONMENTAL PROTECTION

SAVE OUR BEACHES, INC.,
and STOP THE BEACH
RENOURISHMENT,

Petitioners,

vs.

FLORIDA DEPARTMENT
OF ENVIRONMENTAL
PROTECTION and the BOARD
OF TRUSTEES OF THE
INTERNAL IMPROVEMENT
TRUST FUND,

Respondents.

DEP File No.
[04-2960]

PETITION FOR FORMAL ADMINISTRATIVE PROCEEDINGS

(Filed Aug. 10, 2004)

Petitioners, Save Our Beaches, Inc. and Stop the Beach Renourishment, Inc., by and through undersigned counsel hereby respectfully petition for formal administrative proceeding regarding the Department of Environmental Protection's (the Department) and the Board of Trustees of the Internal Improvement Trust Fund's (the Board of Trustees) Consolidated Notice of Intent to issue Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands for the Destin/Walton County Beach Restoration, JCP File Number 021-18419-0014-JC and state:

1. The name and address of each agency affected by this Petition are:

Florida Department of Environmental Protection
3900 Commonwealth Boulevard
Tallahassee, Florida 32399

and

Board of Trustees of the Internal Improvement Trust Fund
c/o Department of Environmental Protection
3900 Commonwealth Boulevard
Tallahassee, FL 32399

2. The name and telephone number of Petitioners are:

Save Our Beaches, Inc.
3474 Scenic Hwy. 98 E
Destin, FL 32541
(850) 654-1887

Stop the Beach Renourishment, Inc.
6507 Pheasant Ridge Road
Dayton, OH 45424
937-572-9023.

3. The name, address and telephone number of Petitioners' representatives, which shall be the address for service purposes during the course of these proceedings, are:

Richard S. Brightman
Florida Bar No. 0347231
Lisa Feuerstein
Florida Bar No. 0591947
Hopping Green & Sams, P.A.
123 South Calhoun Street (32301)
P.O. Box 6526
Tallahassee, FL 32314
850/222-7500

4. The Petitioners' substantial interests are or will be affected by the agency determination in the following ways:

a. The Department is authorized under Chapter 161 and Part IV of Chapter 373, *Florida Statutes*, 2003 (F.S.), and Title 62, *Florida Administrative Code,* (F.A.C.) to issue joint coastal permits for activities undertaken for shore protection purposes.

b. The Department, on behalf of the Board of Trustees, is authorized under Article X, Section 11 of the Florida Constitution, Chapter(s) 253. F.S., Title 18, F.A.C to grant letters of consent to use sovereign submerged lands.

c. On July 15, 2004, the Department issued a Consolidated Notice of Intent to Issue Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands for the Destin/Walton County Beach Restoration Project, JCP File Number 0218419-001-JC (the Intent to Issue). The Destin/Walton County Beach Restoration Project (the Project) will occur on a 6.9 mile stretch of beach located in Okaloosa and

Walton Counties. The Project will include the placement of beach fill, the construction of a beach berm, and dune restoration activities on the Destin/Walton County Beach. The beach fill for the Project will be taken from the East Pass borrow area.

d. The Project would result in the placement of sand on private uplands fronting the Destin/Walton County Beach. The Project would also result in the imposition of a public easement over those private lands.

e. Petitioners are Florida not-for-profit corporations whose members are owners of private riparian uplands fronting on the Destin/Walton County Beach within the area affected by the Project. Members of Petitioners use and enjoy their private access to the beach properties which they own. Petitioners were formed expressly for the purpose of, and are authorized to protect, the private property and natural resources associated therewith owned by their members.

f. Petitioners' substantial interests are affected because the Project would alter the boundaries of Petitioners' members' private upland properties; deny Petitioners' members' riparian rights to future accretions; deny Petitioners' members' riparian rights to access the water; subject portions of Petitioners' members' properties to public easements; and ultimately deprive Petitioners' members' of their fundamental rights to use and enjoy their private land. The Project will also significantly increase

recreational use of the Destin/Walton County Beach, which will in turn adversely affect the natural resources of the Destin/Walton County Beach and surrounding ecologically sensitive coastal areas.

5. On May 28, 2004, Petitioners requested written notice of any and all agency actions relating to the Project. Petitioner received notice of the Intent to Issue by picking up a copy of the Intent to Issue at the Department's office on July 28, 2004.

6. The issues of fact which Petitioners dispute are:

a. whether the Project is not contrary to the public interest;

b. whether the Project will maintain essentially natural conditions;

c. whether the Project will not cause adverse impacts to fish and wildlife resources or public recreation or navigation;

d. whether the project is consistent with the goals and objectives of the "Conceptual State Lands Management Plan" adopted by the Board of Trustees on March 17, 1981, and modified on March 15, 1983;

e. whether the Department properly considered the erosion conditions on the Destin/Walton County Beach;

f. whether the Department properly considered the degree of threat, if any, to existing upland development, recreational interests, wildlife habitat, or important cultural resources on the Destin/Walton County Beach;

g. whether the Department properly identified the location of the mean high water line on the Destin/Walton County Beach;

h. whether the Project will adversely affect the public health, safety, or welfare or the property of others;

i. whether the Project will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;

j. whether the Project will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;

k. whether the Project will adversely affect fishing or recreational values or marine productivity in the vicinity of the Project;

l. whether the Project will adversely affect significant historical and archaeological resources;

m. whether the Department properly considered the current condition and relative value of functions being performed by the Destin/Walton County Beach and

other areas which will be affected by the Project;

n. whether the permit applicant for the Project has provided the Department with reasonable assurances that applicable water quality standards will not be violated by the Project;

o. whether the Project will result in the removal or destruction of native vegetation which will destabilize a frontal, primary, or significant dune;

p. whether the Project will result in the net excavation of the in situ sandy soils seaward of the erosion control line of fifty foot setback;

q. whether the Project will interfere with public access;

r. whether construction of the Project will result in significant adverse impacts to the Destin/Walton County Beach and dune system, marine turtles, their nests and habitat, or adjacent properties and structures;

s. whether sandy materials excavated seaward of the erosion control line or fifty foot setback shall remain seaward of the control line or setback and be placed in the immediate area of construction;

t. whether the Department has limited the Project's disturbances to natural and intact salt-tolerant plant communities

and whether any native salt tolerant vegetation destroyed during construction of the Project will be replaced;

u. whether the fill material that will be placed seaward of the control line as a result of the Project will be sand that is similar to that already existing on the site in both coloration and grain size;

v. whether the fill material that will be placed seaward of the control line as a result of the Project will be free of construction debris, rocks, clay, coarse gravel, cobbles, or other foreign matter;

w. whether the fill material that will be placed seaward of the control line as a result of the Project will be obtained from a source landward of the coastal construction control line and if not, whether the Department properly waived that condition;

x. whether the Project denies upland owners of their legitimate and constitutional use and enjoyment of their properties;

y. whether the Project results in a taking;

z. whether the local sponsors for the Project have obtained, or are able to obtain, all of the requisite private property rights necessary to implement the Project;

aa. whether the Destin/Walton County Beach was properly designated a "critically eroded area";

bb. whether the Project will be constructed in a "critically eroded area" or benefit an adjacent critically eroded shoreline;

cc. whether the engineering data concerning shoreline stability and storm tides related to shoreline topography submitted by the permit applicant for the Project are adequate;

dd. whether the Department properly considered the design features of the Project;

ee. whether the Department property considered the potential impacts of the location of the Project, including potential cumulative effects of the Project on the Destin/Walton County Beach;

ff. whether the Department appropriately. conditioned the nature, timing, and sequence of construction of the Project to provide protection to nesting sea turtles and hatchlings and their habitat, and to native salt-resistant vegetation and endangered plant communities;

gg. whether the Project violates public policy relating to improved navigation inlets;

hh. whether the Destin/Walton County Beach is a downdrift beach in relation to the

borrow site and if it is not, whether an equivalent quality and quantity of sand from an alternate location will be placed on the downdrift beach;

ii. whether the Project has a clearly identifiable beach management benefit consistent with the state's beach management plan;

jj. whether the Project is designed to reduce potential upland damage or mitigate adverse impacts caused by improved, modified, or altered inlets, coastal armoring, or existing upland development;

kk. whether the Project is necessary to provide shoreline stabilization, access to navigable water, or for public water management projects; and

ll. whether the Project is consistent with the Department's adopted Inlet Management Plan for East Pass.

7. The issues of ultimate fact which Petitioners allege are:

a. the Project is Contrary to the public interest;

b. the Project will not maintain essentially natural conditions;

c. the Project will cause adverse impacts to fish and wildlife resources or public recreation or navigation;

d. the project is not consistent with the goals and objectives of the "Conceptual State Lands Management Plan" adopted by the Board of Trustees on March 17, 1981, and modified on March 15, 1983;

e. the Department has not properly considered the erosion conditions on the Destin/Walton County Beach;

f. the Department has not properly considered the degree of threat, if any, to existing upland development, recreational interests, wildlife habitat, or important cultural resources on the Destin/Walton County Beach;

g. the Department has not properly identified the location of the mean high water line on the Destin/Walton County Beach;

h. the Project will adversely affect the public health, safety, or welfare or the property of others;

i. the Project will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;

j. the Project will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;

k. the Project will adversely affect fishing or recreational values or marine productivity in the vicinity of the Project;

l. the Project will adversely affect significant historical and archaeological resources;

m. the Department has not properly considered the current condition and relative value of functions being performed by the Destin/Walton County Beach and other areas which will be affected by the Project;

n. the permit applicant for the Project has not provided the Department with reasonable assurances that applicable water quality standards will not be violated by the Project;

o. the Project will result in the removal or destruction of native vegetation which will destabilize a frontal, primary, or significant dune;

p. the Project will result in the net excavation of the in situ sandy soils seaward of the erosion control line of fifty foot setback;

q. the Project will interfere with public access;

r. the Project will result in significant adverse impacts to the Destin/Walton County Beach and dune system, marine turtles, their nests and habitat, or adjacent properties and structures;

s. sandy materials excavated seaward of the erosion control line or fifty foot

setback will not remain seaward of the erosion control line or setback and will not be placed in the immediate area of construction;

t. the Department has not properly limited the Project's disturbances to natural and intact salt-tolerant plant communities and salt tolerant vegetation destroyed during construction of the Project will not be adequately replaced;

u. the fill material that will be placed seaward of the control line as a result of the Project will not be sand that is similar to that already existing on the site both coloration and grain size;

v. the fill material that will be placed seaward of the control line as a result of the Project will not be free of construction debris, rocks, clay, coarse gravel, cobbles, or other foreign matter;

w. the fill material that will be placed seaward of the control line as a result of the Project will not be obtained from a source landward of the coastal construction control line and the Department has not properly waived that condition;

x. the Project will deny upland owners of their legitimate and constitutional use and enjoyment of their properties;

y. the Project results in a taking;

z. the local sponsors for the Project have not obtained, nor have any plans to obtain, all of the requisite private property rights necessary to implement the Project;

aa. the Destin/Walton County Beach was improperly designated a "critically eroded area";

bb. the Project will not be constructed in a "critically eroded area" or benefit an adjacent critically eroded shoreline;

cc. the engineering data concerning shoreline stability and storm tides related to shoreline topography submitted by the permit applicant for the Project are inadequate;

dd. the Department has not properly considered the design features of the Project;

ee. the Department has not properly considered the potential impacts of the location of the Project; including potential cumulative effects of the Project on the Destin/Walton County Beach;

ff. the Department has not conditioned the nature, timing, and sequence of construction of the Project to provide protection to nesting sea turtles and hatchlings and their habitat, and to native salt-resistant vegetation and endangered plant communities;

gg. the Project violates public policy relating to improved navigation inlets;

hh. the Destin/Walton County Beach is not a downdrift beach in relation to the borrow site and an equivalent quality and quantity of sand from an alternate location will not be placed on the downdrift beach;

ii. the Project does not have a clearly identifiable beach management benefit consistent with the state's beach management plan;

jj. the Project is not designed to reduce potential upland damage or mitigate adverse impacts caused by improved, modified, or altered inlets, coastal armoring, or existing upland development;

kk. the Project is not necessary to provide shoreline stabilization, access to navigable water, or for public water management projects; and,

ll. the Project is not consistent with the Department's adopted Inlet Management Plan for East Pass.

8. The specific rules and statutes which Petitioners contend require denial of the Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands for the Destin/Walton County Beach Restoration, JCP File Number 021-18419-001-JC include:

a. Sections 120.569 and 120.57, F.S.;

b. Section 161.053 F.S.;

c. Section 161.088 F.S.;

d. Section 161.141 F.S.;

e. Section 161.142 F.S.;

f. Section 161.161 F.S.;

g. Section 373.414 F.S.;

h. Rule 62-312.060 F.A.C.;

i. Rule 62B-33.005 F.A.C.;

j. Rule 62B-33.0155 F.A.C.;

k. Rule 62B-36.002 F.A.C.;

l. Rule 62B-49.005 F.A.C.; and

m. Rule 18-21.004 F.A.C.

9. WHEREFORE, Petitioners respectfully demand that;

a. This matter be referred to the Division of Administrative Hearings for the conduct of formal administrative proceedings; and,

b. A Final Order be entered denying the Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands for the Destin/Walton County Beach Restoration, JCP File Number 021-18419-001-JC.

Respectfully. submitted this 10th day of August, 2004, in Tallahassee, Florida.

Hopping Green & Sams, P.A.

BY: /s/ Lisa Feuerstein

Richard S. Brightman
Florida Bar No. 0347231
Lisa Feuerstein
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Attorneys for Save Our Beaches, Inc. and Stop the Beach Renourishment, Inc.

[LOGO]

Department of Environmental Protection

Jeb Bush
Governor

Marjory Stoneman
Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Colleen M.
Castille
Secretary

In the Matter of an
Application for Permit/Water Quality Certification,
and Authorization to Use Sovereign Submerged
Lands by:

APPLICANTS:
City of Destin
c/o Lindey Chabot
4200 Two Trees Road
Destin, FL 32541

Walton County,
c/o Brad Pickel
P.O. Box 1248
Santa Rosa Beach, FL 32459

PROJECT NAME:
Destin/Walton County
Beach Restoration

JCP File Number:
0218419-001-JC

CONSOLIDATED NOTICE OF INTENT TO ISSUE JOINT COASTAL PERMIT AND AUTHORIZATION TO USE SOVEREIGN SUBMERGED LANDS

(Filed Aug. 20, 2004)

The Department of Environmental Protection (the Department) gives consolidated notice of its intent to:

(a) issue a joint coastal permit under Chapter 161 and Part IV of Chapter 373, Florida Statutes (F.S.),

and Title 62, Florida Administrative Code (F.A.C.) (draft copy of permit attached). Issuance of the joint coastal permit also constitutes certification of compliance with state water quality standards pursuant to Section 401 of the Clean Water Act, 33 U.S.C. 1341;

(b) grant a letter of consent to use sovereign submerged lands for the proposed beach fill placement area and use of the proposed offshore borrow area for 5 years or less, under Article X, Section 11 of the Florida Constitution, Chapter(s) 253, F.S., Title 18, F.A.C., and the policies of the Board of Trustees, as described below.

Where applicable (such as activities in coastal counties), issuance of the joint coastal permit also constitutes a finding of consistency with Florida's Coastal Zone Management Program, as required by Section 307 of the Coastal Zone Management Act.

DESCRIPTION OF THE PROPOSED ACTIVITY

The applicants, Walton County and the City of Destin, applied jointly on July 30, 2003 to the Department for a permit/water quality certification and authorization to use sovereign submerged lands owned by the Board of Trustees of the Internal Improvement Trust Fund (Board of Trustees) to restore 6.9 miles of beach. The beach fill areas extend from R-39 in Okaloosa County through R-23 in Walton County. The beach berm will be 210 feet wide, with an elevation of +8 feet, NAVD. The project also includes dune restoration, with a crest elevation of

+12 feet, NAVD. The proposed 261-acre borrow area is an ebb shoal, south of East Pass.

The activity is located in Walton and Okaloosa Counties, Section 35, Township 2 South, Range 21 West through Section 36, Township 2 South, Range 22 West, Gulf of Mexico, Class III Waters.

II. AUTHORITY FOR REVIEW

The Department has permitting authority under Chapter 161 and Part IV of Chapter 373, F.S., and Chapters 62B-49 and 62-312, F.A.C. Pursuant to Operating Agreements executed between the Department and the water management districts, as referenced in Chapter 62-113, F.A.C., the Department is responsible for reviewing this application.

The activity also requires a proprietary authorization, as it is located on sovereign submerged lands owned by the Board of Trustees of the Internal Improvement Trust Fund. The activity is not exempt from the need to obtain a proprietary authorization. Pursuant to Article X, Section 11 of the Florida Constitution, Sections 253.002 and 253.77, F.S., Sections 18-21.00401, 18-21.0051, 62-312.065, F.A.C., the policies of the Board of Trustees, and the Operating Agreements executed between the Department and the water management districts, as referenced in Chapter 62-113, F.A.C., the Department has the responsibility to review and take final action on this request for proprietary authorization.

III. BACKGROUND/BASIS FOR ISSUANCE

A General

The panhandle beaches experienced severe cumulative erosion due to Hurricanes Erin and Opal (1995), Georges (1998), and Tropical Storm Isidore (2002). Because of the post-storm vulnerability of development and loss of recreational beach due to the erosion of these storms, the Department designated these beach restoration sites within Okaloosa County (R-39 to R-50) and Walton County (R-1 to R-23) as critically eroded. The applicants have thus proposed to widen the beach berm to 210 feet, with an elevation of +8 feet, NAVD. The project will also include dune restoration, having a crest elevation of +12 feet, NAVD. The proposed 261-acre borrow area is located within the East Pass ebb tidal delta approximately 2,000 feet offshore, in 18 to 43 feet of water. Use of this borrow area for the beach restoration project is authorized for one time only. Subsequent use of the borrow area as a source of sand for the mitigation project is only authorized for the initial five years of the permit. This is due to the term limit of the proprietary authorization (Letter of Consent).

Pursuant to Chapter 161.088, F.S., restoration of critically eroded beaches is considered to be in the public interest.

Due to the high quality of sand, the dredging and beach disposal is not expected to violate the water quality standard for turbidity. The applicants had

initially applied for a variance to the rule that limits the size of a mixing zone to 150 meters. However, upon reevaluation the applicants determined that an expanded turbidity mixing zone would be unnecessary. Accordingly, the applicants subsequently withdrew the request for a turbidity mixing zone variance. However, the project qualifies for the standard turbidity mixing zone of 150 meters.

The proposed excavation has been designed to minimize direct impacts to the adjacent Gulf beach and inlet shorelines. The proposed excavation is expected to physically impact the downdrift beach west of East Pass by interrupting the natural inlet bypassing of sediment across the ebb shoal. This impact has been calculated to be approximately 11,000 cubic yards per year. Physical mitigation of the sand lost to the downdrift beaches may be required, which will be determined from the results of a comprehensive physical monitoring plan approved by the Department. Since impacts may continue beyond the 5-year duration of a normal construction permit, the Department plans to issue the permit for 10 years. This will extend the physical monitoring and mitigation periods, but not the period for the beach restoration work. Beach restoration work shall not extend beyond 5 years.

There are no submerged natural resources within or adjacent to the designated borrow area or the equilibrated beach template, The existing beach does, however, provide nesting grounds for federally-listed marine turtles, including the Loggerhead, Green,

Leatherback, Kemp's Ridley, and Hawksbill Turtles. In order to avoid impacts to nesting turtles, the applicant will abide by the permit conditions, which address construction activities during the beach nourishment process. The Piping Plover, Snowy Plover, Least Tern, and Black Skimmers also utilize the beaches of Northwest Florida during summer months, and may be found within the project area foraging and nesting. The applicants have agreed to work with the Florida Fish & Wildlife Conservation Commission (FWC) to avoid disturbing any listed shorebirds during the beach nourishment activities. The Choctawhatchee Beach Mouse, a state and federally listed species, also inhabits the sand dunes along this beach. In order to address the concerns of the FWC, the applicants could conduct surveys for this species and would coordinate with FWC to take appropriate protective measures if the species is found within the project site.

Pursuant to Chapter 161.141, F.S., an Erosion Control Line (ECL) must be established to fix the boundary line between sovereignty lands of the state and the upland properties. The ECL will be established prior to construction of the beach restoration project. The existing boundary, which is located at the mean high water line, has already been surveyed.

B. Specific Regulatory Basis for Issuance

Through the above and based on the general/ limiting and specific conditions to the permit, the

applicants have provided affirmative reasonable assurance that the construction of the activity, considering the direct, secondary and cumulative impacts, will comply with the provisions of Chapter 161 and Part IV of Chapter 373, F.S., and the rules adopted thereunder, including Chapters 62B-41, 62B-49 and 62-312, F.A.C. The construction of the activity will not result in violations of the water quality standards set forth in Chapters 62-4, 62-302, 62-520, 62-522, and 62-550, F.A.C. The applicants have also demonstrated that the construction of the activity is not contrary to the public interest, pursuant to paragraph 373.414(1)(a), F.S.

Furthermore, after considering the merits of the application and any written objections from affected persons, the Department finds that on compliance with the permit conditions, the activities indicated in the project description are of such a nature that they will result in no significant adverse impacts to the sandy beaches of the state; are not expected to adversely impact nesting sea turtles, their hatchlings, or their habitat; will not interfere, except during construction, with the use by the public of any area of the beach seaward of mean high water; and are appropriately designed in accordance with Rule 62B-41, F.A.C.

C. Specific Proprietary Basis for Issuance

Through the above and based on the general/limiting and specific conditions to the permit and

consent of use, the applicants have met all applicable requirements for proprietary authorizations to use sovereign submerged lands, pursuant to Article X, Section 11 of the Florida Constitution, Chapter(s) 253, associated Rule 18-21, F.A.C., and the policies of the Board of Trustees. The applicants have provided reasonable assurance that the activity:

(1) is "not contrary to the public interest"

(2) will maintain essentially natural conditions;

(3) will not cause adverse impacts to fish and wildlife resources or public recreation or navigation; and

(4) will not interfere with the riparian rights of adjacent property owners.

In addition, the project is consistent with the goals and objectives of the "Conceptual State Lands Management Plan" adopted by the Board of Trustees on March 17, 1981, and modified on March 15, 1983.

IV. PUBLICATION OF NOTICE

The Department has determined that the proposed activity, because of its size, potential effect on the environment or the public, controversial nature, or location, is likely to have a heightened public concern or likelihood of request for administrative proceedings. Therefore, pursuant to Section 403.815, F.S., Sections 62-110.106, F.A.C., and 62-312.060(14), F.A.C., you (the applicants) are required to publish at

your own expense the enclosed notice of this Consolidated Notice of Intent to Issue. The notice is required to be published one time within 30 days, in the legal ad section of a newspaper of general circulation in the area affected. For the purpose of this rule, "publication in a newspaper of general circulation in the area affected" means publication in a newspaper meeting the requirements of Sections 50.011 and 50.031, F.S., in the county where the activity is to take place. The applicants shall provide proof of publication to:

Department of Environmental Protection
Bureau of Beaches and Coastal Systems
3900 Commonwealth Boulevard,
Mail Station 300
Tallahassee, Florida 32399-3000

The proof of publication shall be provided to the above address within seven days of publication. Failure to publish the notice and provide proof of publication within the allotted time shall be grounds for denial of the permit and to use sovereign submerged lands.

V. RIGHTS OF AFFECTED PARTIES

The Department will issue the permit (draft attached) and consent to use sovereign submerged lands unless a sufficient petition for an administrative hearing is timely filed pursuant to Sections 120.569 and 120.57, F.S., as provided below. The procedures for petitioning for a hearing are set forth

below. Mediation under Section 120.573, F.S., is not available for this proceeding.

A person whose substantial interests are affected by the Department's action may petition for an administrative proceeding (hearing) under Sections 120.569 and 120.57, F.S. The petition must contain the information set forth below and must be filed (received by the clerk) in the Office of General Counsel of the Department at 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000.

Because the administrative hearing process is designed to redetermine final agency action on the application, the filing of a petition for an administrative hearing may result in a modification of the permit or even a denial of the application.

Under Rule 62-110.106(4), F.A.C., a person whose substantial interests are affected by the Department's action may also request an extension of time to file a petition for an administrative hearing. The Department may, for good cause shown, grant the request for an extension of time. Requests for extension of time must be filed with the Office of General Counsel of the Department at 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000, before the applicable deadline. A timely request for extension of time shall toll the running of the time period for filing a petition until the request is acted upon. If a request is filed late, the Department may still grant it upon a motion by the requesting party

showing that the failure to file a request for an extension of time before the deadline was the result of excusable neglect.

In the event that a timely and sufficient petition for an administrative hearing is filed, other persons whose substantial interests will be affected by the outcome of the administrative process have the right to petition to intervene in the proceeding. Any intervention will be only at the discretion of the presiding judge upon the filing of a motion in compliance with Rule 28-106.205, F.A.C.

In accordance with Section 373.427, F.S., and Rule 62-110.106(3)(a)(1), F.A.C., petitions for an administrative hearing by the applicant must be filed within 14 days of receipt of this written notice. Petitions filed by any persons other than the applicant, and other than those entitled to written notice under Section 120.60(3), F.S., must be filed within 14 days of publication of the notice or within 14 days of receipt of the written notice, whichever occurs first.

Under Section 120.60(3), F.S., however, any person who has asked the Department for notice of agency action may file a petition within 14 days of receipt of such notice, regardless of the date of publication.

The petitioner shall mail a copy of the petition to the applicant at the address indicated above at the time of filing. The failure of any person to file a petition for an administrative hearing within the appropriate time period shall constitute a waiver of

that person's right to request an administrative determination (hearing) under Sections 120.569 and 120.57, F.S.

A petition that disputes the material facts on which the Department's action is based must contain the following information, pursuant to Section 120.54(5)(b)4., F.S.:

(a) The name and address of each agency affected and each agency's file or identification number, if known;

(b) The name, address, and telephone number of the petitioner; the name, address, and telephone number of the petitioner's representative, if any, which shall be the address for service purposes during the course of the proceeding; and an explanation of how the petitioner's substantial interests are or will be affected by the agency determination;

(c) A statement of when and how the petitioner received notice of the agency decision;

(d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;

A concise statement of the ultimate facts alleged, including the specific facts that the petitioner contends warrant reversal or modification of the agency's proposed action;

(f) A statement of the specific rules or statutes that the petitioner contends require reversal or modification of the agency's proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes; and

A statement of the relief sought by the petitioner, stating precisely the action that the petitioner wishes the agency to take with respect to the agency's proposed action.

A petition that does not dispute the material facts on which the Department's action is based shall state that no such facts are in dispute and otherwise shall contain the same information as set forth above, as required by rule 28-106.301, F.A.C. Under sections 120.569(2)(c) and (d), F.S., a petition for administrative hearing must be dismissed by the agency if the petition does not substantially comply with the above requirements or is untimely filed.

This action is final and effective on the date filed with the Clerk of the Department unless a petition is filed in accordance with the above. Upon the timely filing of a petition this order will not be effective until further order of the Department.

This intent to issue constitutes an order of the Department. The applicant has the right to seek judicial review of the order under section 120.68, F.S., by the filing of a notice of appeal under rule 9.110 of the Florida Rules of Appellate Procedure with the Clerk of the Department in the Office of General

Counsel, 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000; and by filing a copy of the notice of appeal accompanied by the applicable filing fees with the appropriate district court of appeal. The notice of appeal must be filed within 30 days from the date when the final order is filed with the Clerk of the Department.

Executed in Tallahassee, Florida,

STATE OF FLORIDA
DEPARTMENT OF
ENVIRONMENTAL
PROTECTION

/s/ Michael R. Barnett
Michael R. Barnet, P.E., Chief
Bureau of Beaches and
Coastal Systems

Copies furnished to:

Rajesh Srinivas,
Taylor Engineering
Michael Trudnak,
Taylor Engineering
Mike Barnett, BBCS
Marty Seeling, BBCS
Ralph Clark, BBCS
James Lagrone, BBCS
Paden Woodruff, BBCS
Robert Brantly, BBCS
Phil Flood, BBCS
Junaid As-Salek, BBCS
Steve Pophal, PBS&J
Robbin Trindell,
FWC, ISMS
Reginald Bradley, BBCS
Rolando Gomez, BBCS
Lorna Patrick, FWS
Karen Lamonte, FWC
Kriss Titus,
Walton County
Teresa Zar, ACOE
Connie Lasher,
NW District
Larry O'Donnell,
NW District

FILING AND ACKNOWLEDGMENT

FILED, on this date with the designated Department Clerk, pursuant to Section 120.52, Florida Statutes, receipt of which is hereby acknowledged.

/s/	Della Weaver	7/15/04
	Deputy Clerk	Date

STATE OF FLORIDA
DEPARTMENT OF
ENVIRONMENTAL PROTECTION

STOP THE BEACH
RENOURISHMENT, INC.

Petitioner,

vs.

FLORIDA DEPARTMENT
OF ENVIRONMENTAL
PROTECTION and the
BOARD OF TRUSTEES
OF THE INTERNAL
IMPROVEMENT
TRUST FUND,

Respondents.

DEP File No.
[JLJ 04-3261]

PETITION FOR FORMAL ADMINISTRATIVE PROCEEDINGS

Petitioner, Stop the Beach Renourishment, Inc. ("Petitioner") by and through undersigned counsel hereby respectfully petitions for formal administrative proceedings regarding the Department of Environmental Protection's ("Department") and the Board of Trustees of the Internal Improvement Trust Fund's (Trustees') (collectively, Respondents) establishment of an erosion control line for Walton County and states:

1. The name and address of each agency affected by this Petition are:

Florida Department of Environmental Protection
3900 Commonwealth Boulevard
Tallahassee, Florida 32399

and

Board of Trustees of the Internal Improvement Trust Fund
c/o Department of Environmental Protection
3900 Commonwealth Boulevard
Tallahassee, FL 32399

2. The name and telephone number of Petitioner are:

Stop the Beach Renourishment, Inc.
6507 Pheasant Ridge Road
Dayton, OH 45424
937-572-9023

3. The name, address and telephone number of Petitioner's representatives, which shall be the address for service purposes during the course of these proceedings, are:

Richard S. Brightman
Florida Bar No. 0347231
Lisa Feuerstein
Florida Bar No. 0591947
Hopping Green & Sams, P.A.
123 South Calhoun Street (32301)
P.O. Box 6526 Tallahassee, FL 32314
850/222-7500

4. The Petitioner's substantial interests are or will be affected by the agency determination in the following ways:

a. The Trustees, through the Department, are authorized under Section 161.101(1) Florida Statutes (2003) (F.S.) to create and implement preservation and restoration programs for beaches in Florida.

b. Chapter 161 F.S. sets forth the process for implementing a beach restoration project on a particular shoreline.

c. First, the shoreline must be designated as a "critically eroded shoreline" pursuant to Rule 62B-36.002 Florida Administrative Code (2003).

d. Once a shoreline has been designated as critically eroded, it is eligible to receive funding from the state for construction of a beach restoration project.

e. Prior to construction of such a beach restoration project, however, the Board of Trustees must establish the line of mean high water for the shoreline to be restored. Section 161.141 F.S. This fixed line is called the erosion control line. To establish an erosion control line, the Trustees must issue a resolution to that effect. If there is no judicial review of the resolution or if a court of competent jurisdiction does not prevent the implementation of the beach restoration project, then the Trustees must record the resolution in the records of the county in

which the line is located in order for the erosion control line to have legal effect. See Section 161.181 F.S. Any subsequent additions of land to private upland property landward of the erosion control line are subject to a public easement. Lands created by the restoration project seaward of the erosion control line are state-owned lands, and are also available for public use.

f. Prior to the establishment of the erosion control line, any private upland property that will be taken by the beach restoration project must also be acquired by the requesting authority through eminent domain proceedings. See Section 161.141 F.S.

g. In August 2003, Walton County was designated as having a "critically eroded shoreline" in the Department's Critical Erosion Report.

h. On June 25, 2004, the Trustees issued a resolution establishing the erosion control line for Walton County. To the best of Petitioner's knowledge, the resolution has not yet been filed with Walton County.

i. All members of Petitioner corporation are owners of riparian uplands fronting on the beaches of Walton County, who use and enjoy their private access to the beach property which they own.

j. Petitioner's substantial interests are affected because the establishment of the erosion control line for Walton County will result in the denial of Petitioner's members' riparian rights to

access the water, riparian rights to enjoy the benefits of accretion, and riparian rights to use and enjoy their own private land. Furthermore, the establishment of an erosion control line for Walton County will result in public use of portions of the beach that are currently private. This increased use will adversely affect the resources of the natural beach.

5. Petitioner received notice of the Trustees' resolution establishing an erosion control line for Walton County by picking up a copy of the resolution at the Department's office on August 25, 2004. A copy of the resolution is attached hereto as Exhibit A.

6. The issues of fact which Petitioner disputes are:

a. whether the Walton County shoreline for which the erosion control line is being established is critically eroded;

b. whether the Department was properly guided by the existing line of mean high water in setting the location of the proposed erosion control line;

c. whether the Department followed the requirements of proper engineering in setting the location of the proposed erosion control line;

d. whether the Department properly considered the extent to which erosion or avulsion has occurred on the beaches of Walton County in setting the location of the proposed erosion control line for that shoreline;

e. whether the Department has protected existing ownership of as much upland as is reasonably possible in setting the location of the proposed erosion control line;

f. whether lands and private property rights that will be taken by the establishment of the proposed erosion control line have been properly acquired through eminent domain proceedings.

7. The issues of ultimate fact which Petitioner alleges are:

a. the proposed erosion control line for Walton County is not in the public interest;

b. the proposed erosion control line for Walton County will result in a taking of private upland property;

c. the requesting authority has not acquired through eminent domain all property rights necessary for the establishment of the erosion control line.

d. the Walton County shoreline for which the erosion control line is being established is not critically eroded.

8. The specific statutes which Petitioner contends prevent the establishment of an erosion control line for Walton County include:

a. Sections 120.569 and 120.57, Florida Statutes (2003) ("F.S.").

b. Section 161.088 F.S.

c. Section 161.141 F.S.

d. Section 161.161(5) F.S.

e. Rule 62B-36.002 Florida Administrative Code (2003).

9. WHEREFORE, Petitioner respectfully demands that:

a. This matter be referred to the Division of Administrative Hearings for the conduct of formal administrative proceedings; and,

b. A Final Order be entered invalidating the erosion control line proposed by the Respondents for Walton County.

Respectfully submitted this 30 day of August, 2004, in Tallahassee, Florida.

Hopping Green & Sams, P.A.

BY: /s/ Lisa Feuerstein

Richard S. Brightman
Florida Bar No. 0347231
Lisa Feuerstein
Florida Bar No. 0591947
123 South Calhoun Street
(32301)
P.O. Box 6526
Tallahassee, FL 32314
850/222-7500

Attorneys for Stop the Beach Renourishment, Inc.

EXHIBIT A

BOARD OF TRUSTEES OF THE
INTERNAL IMPROVEMENT TRUST
FUND OF THE STATE OF FLORIDA

RESOLUTION

(Filed Sep. 15, 2004
Division Of Administrative Hearings)

WHEREAS, Sections 161.141 through 161.211, Florida Statutes, authorize the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida to locate and fix an erosion control line in the tidal waters of the State of Florida where beach erosion is a serious menace to the economy and general welfare of the people of the state; and,

WHEREAS, the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida held a public hearing on the 8th day of January, 2004, at the Sandestin Resort, Village of Baytown Conference Center, Sandestin, Florida, on the proposed Western Walton County Erosion Control Line, Walton County as surveyed by John R. Morgan, II, Professional Surveyor and Mapper, Florida Registration Number 3520, being more particularly described in Exhibit A, attached hereto and made a part hereof; and,

WHEREAS, the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida has examined the evidence on the merits of the proposed

beach erosion project and finds that the restoration of the beach is in the interest of the public; and,

WHEREAS, all owners of lands riparian to the proposed erosion control line and within a thousand feet thereof by radial measurement have been notified by certified mail of the proceedings to establish the erosion control line; and,

WHEREAS, the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida has determined that all requirements of the statutes hereunto applicable have been complied within proper manner.

Based on the foregoing, the erosion control line, more particularly described in Exhibit A, is hereby approved, adopted, and certified for the purposes prescribed by Sections 161.141 through 161.211, Florida Statutes, and shall remain in effect until invalidated in accordance with the law.

Signed this the 25th day of June A.D., 2004.

[SEAL]
Board of Trustees of the
Internal Improvement Trust
Fund of the State of Florida

BOARD OF TRUSTEES
OF THE INTERNAL
IMPROVEMENT TRUST
FUND OF THE STATE
OF FLORIDA

By: /s/ Terry E. Wilkinson
Terry E. Wilkinson,
Chief, Bureau of Survey
and Mapping, Division of
State Lands, Department
of Environmental Protection,
as agent for and on behalf
of the Board of Trustees of
the Internal Improvement
Trust Fund of the State
of Florida

APPROVED AS TO FORM
& LEGALITY:

/s/ Gary L. Heiser
DEP Attorney

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SAVE OUR BEACHES, INC., and STOP THE BEACH RENOURISHMENT, INC.,

Petitioners,

vs.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION and the BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND,

Respondents. /

DOAH CASE No.
04-2960
04-3261

PETITIONER'S MOTION TO AMEND PETITIONS FOR ADMINISTRATIVE HEARING

Petitioners, Save Our Beaches, Inc. and Stop the Beach Renourishment, Inc. (Save and Stop), by and through their undersigned counsel and pursuant to Rules 28-106.202 and 28-106.204, F.A.C., hereby file this Motion to Amend Petitions for Administrative Hearing. In support thereof, Save and Stop set forth the following:

1. On August 10, 2004, Save and Stop filed a Petition for Administrative Hearing (the Petition) with the Florida Department of Environmental Protection (the DEP) challenging the DEP's Consolidated Notice of Intent to Issue Joint Coastal Permit and

Authorization to Use Sovereign Submerged Lands for the Destin/Walton County Beach Restoration, JCP File Number 021-18419-001-JC (the NOI). The DEP subsequently referred the Petition to the Division of Administrative Hearings (DOAH) for formal administrative proceedings where the petition was assigned DOAH Case Number 04-2960.

2. On August 30, 2004, Stop the Beach Renourishment, Inc., filed a Petition for Formal Administrative Proceeding challenging a Resolution adopted by the Board of Trustees of the Internal Improvement Trust Fund purporting to establish an Erosion Control Line (the "ECL") in Walton County in association with the Destin/Walton County Beach Restoration project. DEP referred this petition to the Division of Administrative Hearings, where it was assigned DOAH Case Number 04-3261.

3. DOAH Case Numbers 04-3261 and 04-2960 were consolidated by an ORDER CONSOLIDATING CASES entered on September 27, 2004.

4. During September and October 2004, several hurricanes hit Florida. In light of the effects those recent hurricanes had on the Destin/Walton Beaches, Walton County, the City of Destin, Save, and Stop have all agreed that Save and Stop will abandon their challenge to the beach-related technical aspects of the NOI and the ECL.

5. Save and Stop request leave to amend their Petitions to reflect their abandonment of the beach-related technical aspects of the NOI and the ECL,

and re-state their surviving claims. Amendment of the Petitions will substantially reduce and limit the issues before the administrative law judge during the final administrative proceeding in DOAH case numbers 04-2960 and 04-3261, and will reduce the estimated length of the final hearing in this case from three weeks to one week.

6. An original of Save and Stop's FIRST AMENDED PETITION FOR FORMAL ADMINISTRATIVE PROCEEDINGS is attached hereto as Exhibit A.

7. Counsel for Save and Stop has discussed this MOTION TO AMEND PETITIONS FOR ADMINISTRATIVE HEARING with counsel for Respondents, and has been authorized to state that none of the Respondents object to this motion.

WHEREFORE, based upon the foregoing, Save and Stop set forth that they have demonstrated good cause to be granted leave to amend their Petitions and respectfully requests that they be granted leave to amend their Petitions as set forth in the Amended Petition for Administrative Hearing attached hereto as Exhibit A.

Respectfully submitted this 13th day of December, 2004.

HOPPING GREEN & SAMS, PA

/s/ Richard S. Brightman
Richard S. Brightman
Florida Bar No. 347231
Lisa J. Feuerstein
Florida Bar No. 591947
HOPPING, GREEN & SAMS
P.O. Box 6526
Tallahassee, FL. 32314
(850) 222-7500
Attorneys for Petitioners Save Our Beaches, Inc. Stop the Beach Renourishment, Inc.

[Certificate Of Service Omitted In Printing]

EXHIBIT A

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SAVE OUR BEACHES, INC., and STOP THE BEACH RENOURISHMENT, INC.,

Petitioners,

vs.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION and the BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND,

Respondents.

DOAH CASE No.
04-2960
04-3261

FIRST AMENDED PETITION FOR FORMAL ADMINISTRATIVE PROCEEDINGS

Petitioners, Save Our Beaches, Inc. and Stop the Beach Renourishment, Inc. (collectively, the "Petitioners"), by and through undersigned counsel, hereby file this FIRST AMENDED PETITION FOR FORMAL ADMINISTRATIVE PROCEEDINGS regarding the Department of Environmental Protection's (the Department) and the Board of Trustees of the Internal Improvement Trust Fund's (the Board of Trustees) Consolidated Notice of Intent to Issue Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands for the Destin/Walton County

Beach Restoration, JCP File Number 021-18419-001-JC (the "Permit"), and the Resolution of the Board of Trustees dated June 25, 2004 establishing an Erosion Control Line in Walton County in support of the Permit, and state:

1. The name and address of each agency affected by this Petition are:

Florida Department of Environmental Protection
3900 Commonwealth Boulevard
Tallahassee, Florida 32399

and

Board of Trustees of the Internal Improvement Trust Fund
c/o Department of Environmental Protection
3900 Commonwealth Boulevard
Tallahassee, FL 32399

2. The name and telephone number of Petitioners are:

Save Our Beaches, Inc.
3474 Scenic Hwy. 98 E
Destin, Fl. 32541
(850) 654-1887

Stop the Beach Renourishment, Inc.
6507 Pheasant Ridge Road
Dayton, OH 45424
937-572-9023.

3. The name, address and telephone number of Petitioners' representatives, which shall be the

address for service purposes during the course of these proceedings, are:

Richard S. Brightman
Florida Bar No. 0347231
Lisa Feuerstein
Florida Bar No. 0591947
Hopping Green & Sams, P.A.
123 South Calhoun Street (32301)
P.O. Box 6526 Tallahassee, FL 32314
850/222-7500

4. The Petitioners' substantial interests are or will be affected by the agency determination in the following ways:

a. The Department is authorized under Chapter 161 and Part IV of Chapter 373, *Florida Statutes*, 2003 (F.S.), and Title 62, *Florida Administrative Code*, (F.A.C.) to issue joint coastal permits for activities undertaken for shore protection purposes.

b. The Department, on behalf of the Board of Trustees, is authorized under Article X, Section 11 of the Florida Constitution, Chapter(s) 253. F.S., Title 18, F.A.C. to grant letters of consent to use sovereign submerged lands.

c. On June 25, 2004, the Board of Trustees entered a Resolution purporting to establish an Erosion Control Line in Walton County. On August 30, 2004, Petitioners filed a PETITION FOR FORMAL ADMINISTRATIVE PROCEEDINGS regarding this Resolution, which Petition was subsequently

referred to the Division of Administrative Hearings and assigned DOAH Case Number 04-3261.

d. On July 15, 2004, the Department issued a Consolidated Notice of Intent to Issue Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands for the Destin/Walton County Beach Restoration Project, JCP File Number 0218419-001-JC (the Intent to Issue). On August 10, 2004, Petitioners filed a PETITION FOR FORMAL ADMINISTRATIVE PROCEEDINGS with regard to the Intent to Issue, which Petition was subsequently referred to the Division of Administrative Hearings and assigned DOAH Case Number 04-2960.

e. DOAH Case Numbers 04-3261 and 04-2960 were consolidated by an ORDER CONSOLIDATING CASES entered on September 27, 2004.

f. The Destin/Walton County Beach Restoration Project (the Project) will occur on a 6.9 mile stretch of beach located in Okaloosa and Walton Counties. The Project will include the placement of beach fill, the construction of a beach berm, and dune restoration activities on the Destin/Walton County Beach. The beach fill for the Project will be taken from the East Pass borrow area.

g. The Project would result in the placement of sand on private uplands fronting the Destin/Walton County Beach. The Project would also result in the establishment of an Erosion Control Line, fixing the boundary between state-owned sovereign submerged lands and privately owned uplands,

as well as the imposition of a public easement over those privately owned uplands.

h. Petitioners are Florida not-for-profit corporations whose members are owners of privately owned riparian uplands fronting on the Destin/ Walton County Beach within the area affected by the Project. Members of Petitioners use and enjoy their private access to the beach properties which they own. Petitioners were formed expressly for the purpose of, and are authorized to protect, the private property and natural resources associated therewith, owned by their members.

i. Petitioners' substantial interests are affected because the Project would alter the boundaries of Petitioners' members' private upland properties; deny Petitioners' members' riparian rights to future accretions; deny Petitioners' members' riparian rights to access the water; subject portions of Petitioners' members' properties to public easements; and ultimately deprive Petitioners' members' of their fundamental rights to use and enjoy their private land. The Project will also significantly increase recreational use of the Destin/Walton County Beach, which will in turn adversely affect the natural resources of the Destin/Walton County Beach and surrounding ecologically sensitive coastal areas. The project will also diminish the quality of the waters adjacent to Petitioners' members' privately owned riparian uplands by increasing the turbidity in those waters in violation of state water quality standards, interfering

with Petitioners' members' use and enjoyment of those waters.

5. On May 28, 2004, Petitioners requested written notice of any and all agency actions relating to the Project. Petitioner received notice of the Intent to Issue by picking up a copy of the Intent to Issue at the Department's office on July 28, 2004. Petitioners received notice of the Resolution by picking up a copy of the Resolution at the Department's office on August 25, 2004.

6. The issues of fact which Petitioners dispute are:

a. whether the permit applicant for the Project has provided the Department with reasonable assurances that applicable water quality standards will not be violated by the Project;

b. whether the Project denies upland owners of their legitimate and constitutional use and enjoyment of their properties;

c. whether the Project results in a taking; and,

d. whether the local sponsors for the Project have obtained, or are able to obtain, all of the requisite private property rights necessary to implement the Project.

7. The issues of ultimate fact which Petitioners allege are:

a. the permit applicant for the Project has not provided the Department with reasonable

assurances that applicable water quality standards will not be violated by the Project;

b. the Project will deny upland owners of their legitimate and constitutional use and enjoyment of their properties;

c. the Project results in a taking; and,

d. the local sponsors for the Project have not obtained all of the requisite private property rights necessary to implement the Project.

8. The specific rules and statutes which Petitioners contend require denial of the Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands for the Destin/Walton County Beach Restoration, JCP File Number 021-18419-001-JC include:

a. Sections 120.569 and 120.57, F.S.;

b. Section 161.141 F.S.;

c. Section 161.201 F.S.;

d. Section 373.414 F.S.; and

e. Rule 62-312.060 F.A.C.

9 WHEREFORE, Petitioners respectfully demand that:

a. This matter be referred to the Division of Administrative Hearings for the conduct of formal administrative proceedings; and,

b. A Final Order be entered denying the Joint Coastal Permit and Authorization to Use

Sovereign Submerged Lands for the Destin/Walton County Beach Restoration, JCP File Number 021-18419-001-JC, and invalidating the Resolution of the Board of Trustees establishing the Erosion Control Line in Walton County.

Respectfully submitted this 13th day of December, 2004, in Tallahassee, Florida.

Hopping Green & Sams, P.A.

BY: /s/ Richard S. Brightman
Richard S. Brightman
Florida Bar No. 0347231
Lisa J. Feuerstein
Florida Bar No. 0591947
123 South Calhoun Street
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P.O. Box 6526
Tallahassee, FL. 32314
850/222-7500

Attorneys for Save Our Beaches, Inc. and Stop the Beach Renourishment, Inc.

6-7-05 Save our Beaches.txt

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SAVE OUR BEACHES, INC., AND STOP THE BEACH RENOURISHMENT, INC.,

Petitioners,

vs.

DEPARTMENT OF ENVIRONMENTAL PROTECTION, CITY OF DESTIN, AND WALTON COUNTY.

Respondents.

Case No. 04-2960

STOP THE BEACH RENOURISHMENT, INC.,

Petitioner,

vs.

DEPARTMENT OF ENVIRONMENTAL PROTECTION AND BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND,

Respondents.

Proceedings held in the above-styled cause before the J. LAWRENCE JOHNSTON, Administrative Law Judge, on the 7th day of June, 2005, at

the South Walton Courthouse Annex, 31 Coastal Centre Boulevard, Santa Rosa Beach, Florida, 32459.

REPORTED BY:

ELAINE RICHBOURG

Court Reporter
2475 Crockett Street
Cantonment, Florida 32533
Telephone: (850) 968-6465

APPEARANCES

FOR THE PETITIONERS Save Our Beaches and Stop the Beach:	D. KENT SAFRIET, ESQUIRE Hopping Green & Sams 123 Calhoun Street Tallahassee, FL 32314
FOR THE RESPONDENTS City of Destin and Walton County:	KENNETH J. PLANTE, ESQUIRE Roetzel & Andress 225 South Adams Street Suite 250 Tallahassee, FL 32302-2369 and KELLY B. PLANTE, ESQUIRE
FOR THE DEPARTMENT OF ENVIRONMENTAL PROTECTION:	MARK S. MILLER, ESQUIRE Department of Environmental Protection Marjory Stoneman Douglas Bldg. 3900 Commonwealth Blvd. MS 35 Tallahassee, FL 32399-3000
Agency Representatives:	LINDA CHERRY SLADE LINDSEY

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[4] PROCEEDINGS

JUDGE JOHNSTON: We're here for the final hearing and the case is entitled Save our Beaches, Inc., and Stop the Beach Renourishment, Inc., petitioner versus Department of Environmental Protection, City of Destin and Walton County, respondents, in Division of Administrative Hearings case number 04-2960, which is consolidated with another case, Stop the Beach Renourishment, Inc., petitioner, versus DEP and Board of Trustees of the Internal Improvement Trust Fund. And that's case number, DOAH case number 04-3261. Those are consolidated and my name is J. Lawrence Johnston, the Administrative Law Judge assigned to the case.

And counsel make their appearances for the record at this time.

MR. SAFRIET: On behalf of the petitioners, Kent Safriet from Hoping [sic] Green & Sams, Tallahassee, 123 South Calhoun Street.

MR. MILLER: Your Honor, Mark Miller, Florida Department of Environmental Protection.

MR. PLANTE: Kenneth Plante with Roetzel & Andress representing the city of Destin and Walton County.

KELLY PLANTE: Kelly Plant [sic], also with Roetzel & [5] Andress.

JUDGE JOHNSTON: There was a prehearing stipulation filed in the case sometime back, which there have been no changes or amendments to it that I'm aware of. So I'm aware of that stipulation, which is as I read it, there are basically two issues in front of me with the hearing. I also have recently received, from the County and City, a joint request for official recognition, which was just filed on Friday, June 3rd. Is there any response to that at this time?

MR. SAFRIET: Yes, Your Honor. But if I may, with respect to prehearing stipulation, there are actually two in the record. Petitioners filed their –

JUDGE JOHNSTON: That's correct.

MR. SAFRIET: But there's still the two same issues. There was a dispute as to the characterization of those. And with respect to the official

recognition, the petitioners only object to two portions, two items in the motion, which is – which are chapter 2004 475, Laws of Florida, as well as the senate staff Analysis of that chapter Law, based on relevance. It's not relevant to the two issues before the court, Your Honor.

[6] JUDGE JOHNSTON: Any response to that at this time?

MR. PLANTE: We think they're relevant, Your Honor. Just because this is a beach erosion project and that gives you the continuity of the history of the importance of its estate.

JUDGE JOHNSTON: I'll reserve ruling on relevance of it and evaluate that when I hear the rest of the evidence.

MR. SAFRIET: Right. If it's admitted, petitioner will take the position that staff analysis is not indicative of Legislative intent. It's unclear what the staff analysis is even being proposed for. So to the extent it's intended to show Legislative intent, the staff analysis itself indicates that it's not indicative of Legislative intent. So since you're reserving ruling, we'll raise those objections at the time it's offered.

JUDGE JOHNSTON: Okay. Other than that then, I'll grant the motion for official Recognition. Anything else preliminarily that should be put on the record at this time?

Any opening statements at this time?

MR. PLANTE: No, Your Honor.

MR. MILLER: Nothing from the Department, Your [7] Honor.

MR. SAFRIET: The petitioners will reserve until their case.

JUDGE JOHNSTON: All right. You may call your first witness.

MR. PLANTE: The City of Destin, Walton County would like to call Phillip Flood.

THEREUPON:

PHILLIP FLOOD,

having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. PLANTE:

Q would you please state your name and business address?

A Phil Flood. 3900 Commonwealth Boulevard, Tallahassee, Florida.

Q And where are you currently employed?

A The Florida Department of Environmental Protection, Bureau of Beaches and Coastal Systems.

Q And how long have you been employed with the Department?

A I've been with the Department for 23 years.

[8] Q What is your current position with the Department?

A My title is Environmental Manager with the Bureau of Beaches and Coastal Systems.

Q And how long have you held that position?

A About six and a half years.

Q Would you please summarize your educational background since graduating from high school?

A Well, I attended the University of South Florida for a short period of time and then transferred to Florida State, where I graduated with a Bachelor's of Science in Geography with an emphasis on Planning and Environmental Management. Since that time I've completed several project management and administrative training classes, and annually attend seminars and conferences to keep abreast of Coastal Management Practices and new technologies in the form of beach management.

Q Would you please summarize your employment background?

A I started my professional career with the, then the Department of Natural Resources, which became the Department of Environmental Protection with the Division of Recreation and Parks. I was

hired in the office of Policy and Planning to write the State's outdoor recreation plan and do Resource Protection Plans for [9] rivers and wetlands around the State. I also coordinated the Department's review of local government comprehensive plans. I later moved on to the, then, Division of Beaches and Shores, which is currently the Bureau of Beaches and Coastal Systems, where they hired me to draft the State's Comprehensive Beach Management Plan and also to review the coastal elements of local government comprehensive plan.

The job entailed working a lot with local governments and administering the beach erosion control program, which is a technical and financial assistance program for local governments.

Q Do you have anything to add to as far as your current duties and responsibilities or did you –

A Well, currently, currently I head up our project management section, which consists of several project managers that work with cities and counties. Specifically to implement the State's Beach Management Plan, the Strategic Beach Management Plan. As I mentioned earlier, we work with cities and counties providing technical and financial assistance and aid them in assessing the need to restore critically eroded beaches around the State.

Q What exactly is the Strategic Beach Management Plan, is it a Department document or please explain it?

[10] A The Strategic Beach Management Plan is a formally adopted plan by the State of Florida prepared by the Department and it's to address management of the State's critically eroded beaches. It identifies – it takes a look at the State's 825-miles of sandy beach that fronts the Gulf and the Atlantic and makes management recommendations as to how to administer or protect and manage the critically – those beaches that have been designated as critically eroded.

Q What is a critically eroded beach?

A A critically eroded beach, it's a designation adopted by the Department. The Department annually identifies and evaluates beaches and identifies those that are critically eroded. And the definition for critical erosion is – actually it's critically eroded as opposed to eroding. Critical erosion essentially means that the beach and dune system has been eroded from natural or man induced effects, such to the point that upland properties and coastal resources and recreational amenities are threatened by further erosion.

Q And it ends up as a list of the beaches?

A Yes, sir. Annually, the Department evaluates – it takes a look at the monitoring reports. The Department has a detailed monitoring program where we look at beach and dunes around the State of Florida. [11] They annually review all the monetary data, look at videography, historic shoreline rates, and erosion rates, take into account any storm effects. And then annually they make a recommendation to

modify the critical erosion report. That report is then routed around – if the changes are proposed, the report is routed around to local government agencies and locals are then given the opportunity to review our proposed designations and also rebut or ask that, you know, additional areas be added into the designation.

Q What exactly is the Department's role in the State's efforts to renourish beaches?

A The State of Florida, pursuant to Chapter 161 Florida statute is the State authority on beach management activities. The State recognizes the value of Florida's beaches. The beach and dune system serve as buffers and protection from storm events to upland properties. And the State of Florida recognizes that the value of those upland properties, there's billions of dollars of taxable properties located landward of the beach and dune system. Local communities derive millions of dollars annually in taxes from that. And our beaches are the cornerstone of the State's tourism industry, tracking tourists as well as residents to come to the State.

[12] The beaches also provide environmental, also, provide environmental benefits. There is habitat that supports a variety of threatened and endangered plants and animals. And the State recognizing this important, has directed the Department to evaluate all the critically eroded beaches and determine whether or not the beach should be restored.

And to further that, they provide the Department with thirty million dollars annually to give to cities and counties and Federal government to restore beaches, critically eroded beaches around the State.

So, the concept of beach restoration – should I continue on and talk about beach restoration, Your Honor?

Q Well, that was going to be my next question but first, is the State – is DEP, Department of Environmental Protection basically the keeper of the keys to beach restoration to the State; do all projects go through your office?

A Beach restoration, the decision to restore beaches is a local matter. The State has a directive to determine whether critically eroded beaches can be restored or not or should be restored. And we do that through conducting feasibility studies. But the decision whether or not to restore beaches is left up to the local [13] government. They can then, in turn, apply for funding from the State. They most certainly have to apply for a State permits to get environmental authorization to construct the beaches. But the actual matter to decide whether or not to build a beach and what level of storm protection to afford is something that's up to the local government.

Q Okay. And going back to then before I ask you that question, what is the process for beach restoration?

A Well, it starts with the designation. And I should mention that in order to receive funding from the State of Florida, a beach restoration project must be designated critically eroded. That won't prevent someone, a local government from restoring a beach. But in order to receive funding, a local government beach must be designated as critically eroded. The process for doing a beach restoration starts with a local government, recognizing that they have an erosion problem and having the desire to want to address that. They typically will ask for funding from the State of Florida. And upon receipt of that, they'll embark on a long, multi-year process of doing the necessary studies and designing construction.

Once they receive that funding and move forward, they'll select a consultant who will then will [14] initiate a feasibility study, which typically involves engineering analyses, environmental assessments, detailed geotechnical sand search investigations, and also take a look at some economic factors involved. The engineering analysis consists of looking at the current and historical erosion rates in the area shoreline conditions. They'll come up with a design objective. And as far as what level storm protection that one might want to build, and I should probably back up here a little bit and explain, that the whole purpose of the beach restoration is to provide protection to the upland properties. And the concept of beach restoration is essentially filling the land such that removal of the waterline farther from the properties that are threatened. So, we'll essentially

build a beach, sometimes 50, 100, 200 feet wide, where by removing the shoreline, mean high water and wave energies farther from the houses. These projects have a life expectancy. They are designed to provide a certain level of storm protection. And through this feasibility study, the engineers will come up with some conceptual ideas, they'll identify a design objective, perhaps protection from a 15 or 20 year storm event and they will come up with some conceptual design alternatives.

They'll also conduct a real important [15] component, which is a vulnerability analysis, to look at what is actually threatened, what homes, infrastructure, coastal or recreational resources that could be threatened with erosion.

The next step would be to conduct environmental assessments, which is, essentially an inventory assessment of habitat, of the beach and dune habitat as well as the near shore and off shore resources that might be located below the water line. And then the environmental assessments, you're typically looking to identify potential adverse impacts that could occur from the placement of sand and dune construction, actual construction of the beach. And then also to make recommendations as to how to avoid any sort of adverse impact.

One of the key components is the sand source investigation, the geotechnical studies. And these beach projects are typically several miles in length. They vary depending upon the length of the critical

erosion area. But in order to find a significant amount of sand, we typically go offshore and look for sand below the waterline. Usually, well, you try to get the sand from a reasonable proximity to the project area.

Specifically, you're looking for a sediment, and a sand that is similar, comparable to what's on the [16] beach, that exists on the beach as it is today or prior to the project. Specifically, look at color. They look at the composition of the beach, of the sediment, whether it's very shelly, what it's composed of.

Another importance is the grain size. You don't want anything too course or too fine. And then real important is whether or not it's clean material that doesn't have a lot of rock or silt in it. These all come into play in how well the beach will perform, as well as environmental concerns, such as shorebird use and sea turtle nesting, those sort of things.

Once you –

MR. SAFRIET: Your Honor, I'm not sure that there's another question pending. The witness has spoken now for quite a period of time and I forgot what the question was. I don't know if it's responsive to a question.

JUDGE JOHNSTON: I've forgotten.

THE WITNESS: I was asked to explain the process of beach restoration.

MR. SAFRIET: And I think he's done that.

THE WITNESS: Well, there's a feasibility phase. That was the first step of a multi-step process.

MR. PLANTE: If I may, Your Honor, the purpose [17] of this witness and the next witness are to give you a background so you can put everything in context as opposed to just hitting you with some facts that –

JUDGE JOHNSTON: I appreciate that. But on the other hand, it may be time for another question.

MR. PLANTE: I will ask another question.

THE WITNESS: Would you like for me to just quickly summarize the remainder of the process?

MR. PLANTE: I'll ask you another question.

Q (By Mr. Plante) Would you please summarize the remainder of the process?

A Once the feasibility study has been completed, it's the decision of local government to move forward at this point. They've come up with some cost estimates and there's usually several workshops involved. Then they move into the design and permitting stages. Then this is where they'll finalize the design, finalize the sand source and actually apply for environmental permits. The permits are submitted to the State of Florida. And, also, to the Federal Government. There's typically two permits involved in a beach restoration project. And the

Department of Environmental Protection as well as the Corps of Engineers will issue permits on beach restoration projects. During the permit review process, the agency will review the proposed project to make sure [18] that it's consistent with their policies, rules and regulations and that it won't have an adverse impact on the beaches. It goes through very detailed – and usually takes about a year or longer, the permitting process in which the reviewing agency, the environmental regulatory agencies will ask detailed questions of the sponsor. And if it's decided to – that the permit can be issued – the Corps of Engineers and State of Florida, both issue a permit that usually has conditions to take precaution to protect the environment.

Q You had mentioned earlier the design life of a project, could you illustrate to the court exactly what it is, I have – I'll lift it up here.

A Bear with me. I'm not the greatest artist here. Assuming that this is – this is your current beach with a house over here, and the waterline may, perhaps comes right up over to here, when you design a beach restoration project, as I mentioned, you want to provide a certain level of storm protection. So the engineers will determine that you need to provide a certain volume of sand and it will be – the beach will be built, typically will raise the beach, and you will put out material out to, say, to here. And this may be a hundred feet or so. This is considered the design berm. And this is the storm protected value. You build the [19] beach, this is going to be providing your

storm protection. You're typically in an erosive area. So once you build it, waves will start to hit it and in a short period of time, it will start to erode and you've already compromised your design.

So what the engineers do is they provide some additional material out here. And this extra sand over here is sacrificial sand. And it has a life expectancy. They determine how much sand to place out there base [sic] upon the cost estimates and the sediment quality and what the rates of erosion are. But essentially, this sacrificial sand right here will have a life expectancy. It's typically six to eight years. Sometimes it goes as far as ten or twelve years. But during the course of that life expectancy, the six or eight or ten years, this portion right here will erode back to your storm protective, your design berm. At that point it triggers maintenance nourishment. Essentially, just like a road, you don't build it and walk away, you have to maintain it, the same thing with beaches. You build the beach and when a portion of it erodes, before you lose your storm protection value, you come and you do another maintenance nourishment. Or just like on a road, you would resurface the road. So, you put this little extra material out here. So you design your project. You build it. You [20] monitor it. And then at the certain – the correct period of time, when the portion of it has eroded, you come back and you put a portion of it back. You never want to let the beach erode all the way back. It's very costly and plus you've lost all –

you've compromised your design, you've lost all your storm protected value in your beach there.

Q Thank you. You had mentioned about the 820 plus or minus miles of beach in Florida. How many miles of beaches have been restored, do you know?

A There is about 175 miles of the beach, of the State's coastline that has been restored and is actively being managed through a maintenance nourishment program.

JUDGE JOHNSTON: I'm sorry, how many?

THE WITNESS: About 175 miles.

Q (By Mr. Plante) Do you know how many separate projects that involves?

A It's 11, were conducted in phases. But if you summarized all phases, there's about 45 distinct projects around the State of Florida from the Gulf to the Atlantic have been restored.

Q And how many of those have you been involved with?

A I believe I've worked on all but about three of those projects where I've had a role in either assisting [21] the local government with technical or financial assistance. And those three were, one of them was done prior to my working with the Department. And then the other two, one was a military base that they did not seek any funding from us.

MR. PLANTE: Your Honor, I have handed up there a copy of Mr. Flood's resume and, of course, opposing counsel has one. At this time I would like to tender Mr. Flood as an expert witness in the area of processing, permitting of beach renourishment application?

JUDGE JOHNSTON: Any objection or voir dire?

MR. SAFRIET: Yes, Your Honor. I would object that that's a field of expertise. It's his job as a State employee to process these permits. I don't think you have to be experienced in a field to process permits. No permitting agent in any organization has to be an expert to do so. So, I would object to that's a field of expertise. I would not object to the fact that Mr. Flood has processed these permits.

JUDGE JOHNSTON: Well, I'm not sure what kind of opinions he would be eliciting based on that expertise. So why don't we proceed. There may be some areas where there is expertise gained as a [22] result of the processing, which maybe relevant. so we'll proceed at this point.

MR. PLANTE: Your Honor, if I may make a comment, there's a difference between someone that's been doing it the 26 years and just three months on the job. And I think that at some point, even though you're doing the process, you do become an expert in it as opposed as to if everybody looks towards you, you are the – he's the person in the State that

handles this. I've only got a couple more questions of Mr. Flood.

JUDGE JOHNSTON: Let me ask, are you moving this resume as an exhibit?

MR. PLANTE: Excuse me, yes. I'd like to move that as respondent's exhibit 1 or A, whatever way you're going to number them.

JUDGE JOHNSTON: 1 is fine.

Q (By Mr. Plante) Mr. Flood, are you aware of the –

JUDGE JOHNSTON: Now, you say respondents, that's all respondents?

MR. MILLER: It's a joint.

MR. PLANTE: It's a joint, respondent's joint exhibit 1.

JUDGE JOHNSTON: Okay.

[23] Q (By Mr. Plante) Are you familiar with the project that's the subject of this administrative hearing?

A Yes, I am.

Q When did you become aware of it?

A Shortly after Hurricane Opal, which made landfall, I think in '95 and '94, '95. At that point, the beaches in the panhandle were significantly effected [sic] and a large portion of the beaches throughout

the panhandle were designated as critically eroded. At that point, local governments sought advice and assistance on how to address the erosion problems that they had.

Q So, the area encompassed by this project has been designated by the state as a critically eroded beach?

A Yes, it has.

Q And has it received State funding?

A Yes, it has. For just the feasibility design and construction phase of the project.

MR. PLANTE: I have no further questions, Your Honor. Thank you?

JUDGE JOHNSTON: Anything from DEP?

MR. MILLER: Nothing from the Department, Your Honor.

JUDGE JOHNSTON: Any other cross?

[24] MR. SAFRIET: Yes, Your Honor.

CROSS EXAMINATION

Q (By Mr. Safriet)

BY MR. SAFRIET:

Q Good morning, Mr. Flood?

A Hi.

Q During your earlier testimony you testified to the background of the renourishment project. Are you familiar with the Chapter 161, Florida Statutes?

A Yes, sir.

Q Is that the governing Statute with respect to beach renourishment projects?

A Yes, it is.

Q Are you familiar with the provisions and requirements, procedurally and substantially for beach renourishment projects.

A I have a pretty good understanding of them, yes.

MR. PLANTE: Excuse me, Your Honor, counsel, we discussed it before, rather than objecting, as to going to outside the scope, since Mr. Safriet is also going to call him, in order to move the process along, we're not going to object so we can do it all at once on cross and redirect.

JUDGE JOHNSTON: All right. That's fine.

[25] MR. SAFRIET: I'm sorry. I should have mentioned that earlier, Your Honor.

Q (By Mr. Safriet) Mr. Flood, are you familiar with Section 161-.161?

A Yes, I'm familiar with it. I believe it deals with the funding of projects and determining beach projects.

Q Well, let's back up because you gave us a general overview of the process for designating a critically eroded beach and getting to the point where we're at now. Under the processes, under 161, what does the Department have to do, what are several of the factors the Department has to do before a beach can be renourished?

A Well, as far as what does the Department have to do?

Q Yes. Can you just go out and start putting sand on the beach or is there notice requirements or studies?

A I don't believe that 161 requires some of those things that you had specifically mentioned there. There are such things that – 161 deals largely with the management of the beaches. It also discusses the funding of the beaches. One of the things is when you're ready to do the beach project, you must set an erosion control [26] line. There are several requirements in there. But a lot of it speaks to the funding of beach nourishment programs, as well as the construction activities and funding activities out there, as well.

Q What is erosion control line?

A An erosion control line is required by Florida Statute that must be established prior to the construction of a beach restoration project. As I mentioned, the beach restoration, includes the filling of land in almost every case in the State of Florida,

along the Atlantic and Gulf Coast. The lands below the mean high water line are owned by the State of Florida. So when you're dredging sand and filling sand, placing it on the beach, you'd be filling State owned lands and erosion control line established at the current mean high water line as law or the Statute states, on or about the mean high water line. And what it does, it established, prior to the project and what it does, is it establishes where the upland private property stops and where the submerged State own [sic] land begin. So that when you build a beach, the upland property owner will not take title to all the new dry sandy beach.

Q I'm sorry?

A I was going to say, the Florida common law, pretty much holds that the property owner owns the mean [27] high water line. And as said, the mean high water line changes throughout the day, throughout, I guess it changes with various storm events as the beach is in such dynamic area, the mean high water line fluctuates. If the beach erodes, the upland property owner loses property and the submerged lands, it continues to be owned by the State of Florida. If the beach happens to be in an accretional area, the beach grows, then the upland property owner gains property. The erosion control line fixes that property prior to a beach restoration project. So we surveyed them and established an erosion control line and the [sic] build a beach. And then the State retains the property that they

previously had, prior to the project, and the upland property owner retains their property, as well.

Q Okay. So the erosion control line sets a dividing line between State lands and private uplands; correct?

A Yes, sir.

Q And you testified earlier that after the beach renourishment project, there will be dry sands seaward of the erosion control line; correct?

A There should be, yes.

Q So the upland property owner would stop somewhere in mid beach or three quarters of the way out [28] to the beach then there would be another area of sand and then you'll hit the mean high water line; correct?

A Yes, sir.

Q Okay. Does chapter 161 require notice be provided before erosion control line has been established or adopted or set?

A Yes, it does. It requires that the riparian property owners be notified at a public hearing.

Q Did the Department or the trustee provide such notice in this case?

A The local governments, Walton County and the City of Destin, did provide public notice to a –

certified letters to the upland riparian owners of record prior to the erosion control line hearings.

Q Okay. Let me hand you this document. The document I just handed you were some answers to interrogatories and a companion Circuit Court Case involving Constitutional issues in this case. The answer to interrogatory number 2 and the list you provided –

MR. PLANTE: Objection, Your Honor. Relevance.

MR. SAFRIET: Your Honor, in that case Mr. Flood verified that he sent notice as required under 161 to these riparian owners of record and attached to the document are the lists of those riparian owners, which includes petitioners to [29] establish standing.

MR. PLANTE: I would object to this line of questioning unless it is limited to going toward standing.

MR. SAFRIET: Absolutely.

JUDGE JOHNSTON: All right.

MR. MILLER: Excuse me, Your Honor, do you have a copy for me?

MR. SAFRIET: I thought I did. I have just one copy. I apologize, Mark.

Q (By Mr. Safriet) Mr. Flood, you testified in this verification to these interrogatories that the list

of individuals attached to that document are the riparian owners of record that were provided notice; correct?

A Yes, sir. This is what the cities and counties have provided us as the upland property owners of record at the time the surveys were –

Q So those lists include the riparian property owners of record?

A Yes, sir.

MR. SAFRIET: Your Honor, I would move that as petitioner's exhibit 1.

MR. PLANTE: Your Honor, I would object. This has never been identified as an exhibit.

MR. SAFRIET: It's a rebuttal exhibit, Your [30] Honor.

MR. PLANTE: A rebuttal of what?

MR. SAFRIET: And it wasn't provided to us until April 14, 2005. So I couldn't identify it in February as an exhibit.

MR. PLANTE: It's been 3 months since then, Your Honor.

MR. SAFRIET: Your Honor, I would be calling Mr. Flood tomorrow at 11:00 to rebut standing that the respondents are going to challenge against the petitioners, presumably later today. And having Mr. Flood being called earlier, this will be a rebuttal

exhibit. We agreed to that procedure. If you want, I'll save the question and we'll call Mr. Flood tomorrow and it will be a rebuttal exhibit then to the respondents attack on standing of the clients.

JUDGE JOHNSTON: Well, the objection is not as to the order of the questioning but it's as to the admissibility of the exhibit, which is not on any exhibit list.

MR. SAFRIET: And, Your Honor, that's fine. If we can, I can hand Mr. Flood a list of the members of SOB, which is about 150 or 140 and he can compare them on the stand with the names of these two lists, [31] which are lengthy. Either way is fine with me. I'm just trying to do it quicker rather than the longer manner. And the exhibit won't need to be admitted. It will be in his testimony.

JUDGE JOHNSTON: Unless it's withdrawn, then I will sustain the objection.

MR. SAFRIET: Did you withdraw it?

MR. PLANTE: I'll withdraw the objection, Your Honor.

JUDGE JOHNSTON: So, I'll receive the exhibit. Do you have the exhibit?

MR. SAFRIET: The witness has it. When he's finished with it.

JUDGE JOHNSTON: This entire document is the exhibit?

MR. SAFRIET: Yes, Your Honor.

JUDGE JOHNSTON: So, I'll mark it as petitioner's exhibit 1 and it's received. Does the witness need the exhibit back?

MR. SAFRIET: No, Your Honor. I'm done with it. Thank you.

Q (By Mr. Safriet) Mr. Flood, did you review – I'm sorry, strike that. Who prepared the draft, joint coastal permit?

A That would have been done by our permitting [32] section. So, certainly not by myself. I'm in the project management section. We have an environmental permitting section that does the actual permitting review.

Q Do you know a name of an individual that drafted it in that section?

A It was probably Jamie Christoff. There's several folks that are involved in that process.

Q Did you review the draft permit before it was noticed?

A I did not.

Q Did you have any involvement in the Notice of Intent to issue, the preparation thereof or review thereof?

A No, I did not.

Q Did you consider the effect of the – effect of the beach renourishment project on riparian rights of the petitioners?

MR. PLANTE: Objection, Your Honor. Relevance. All of those issues on riparian rights have been removed from this proceeding.

MR. SAFRIET: No, Your Honor. Under Rule 18-2103, Florida Administrative Code, as you'll note in petitioner's prehearing statement, they raised the issue of whether or not the City and the County [33] have acquired the necessary interests to proceed for a joint coastal permit as well as sovereign submerged lands authorization. And that Rule under 3-B requires the Department to consider whether or not riparian rights are infringed upon. And if they are, the Department has – not the Department, the; respondents have to provide and I quote, "satisfactory evidence of sufficient upland interests", that's a defined term in the regulations, before a permit is issued. And in this proceeding, we're contesting whether the City has, in fact, provided that, quote, unquote, "satisfactory evidence of sufficient upland interests." And that's at issue in this case. And so it's a regulation and Department itself has noticed in their notice of intent that no riparian rights will be interfered with. So the Department has found, as a matter of fact, that no riparian rights will be interfered with. However, now I can't question the witnesses on that. It's directly relevant, Your Honor.

JUDGE JOHNSTON: Well, as I understood the two issues that were framed in the prehearing stipulation is whether the applicants, namely the City and County, have the necessary property [34] interests, whether they're deemed riparian interests or whatever, not whether other riparian interests are being interfered with.

MR. SAFRIET: Your Honor, it's all part and parcel of the same test. If you look at 18-2104 –

JUDGE JOHNSTON: Hold up a second and let me grab the prehearing stipulation.

MR. SAFRIET: Okay.

JUDGE JOHNSTON: Okay. I'm looking at your version of the prehearing statement, your prehearing statement. Where are you directing me to?

MR. SAFRIET: Yes, Your Honor, it would be paragraph G-2.

JUDGE JOHNSTON: Okay. As I read that issue and when I mentioned at the outset, that I understood that they were only two issues. That's one stated right there. And this refers to the interests that the applicants have, not the interests that somebody else has. It might be interfered with.

MR. SAFRIET: Your [sic] correct, Your Honor. And if I could point you to the Rule 18-21 is cited there. That rule provides a test, Your Honor. Because our allegation is that the City and County

have not provided satisfactory evidence of that upland [35] interest. Well, apparently there's conception [sic] in that rule. If you go to the last sentence that says satisfactory evidence of sufficient upland interests is not required for activities on sovereign submerged lands that are not riparian to uplands or when a governmental entity, which they are in this case, conducts restoration and enhancement activities, which they're do in this case, provided that such activities do not unreasonably infringe on riparian rights. So to the extent that the City and Count [sic] wants to take advantage of that exception, and it appears that they have because the Department itself has Notice of Intent found there was no unreasonable infringement on those rights. So the evidence we've solicited rebuts their allegation that they meet that criteria. Otherwise, they have to provide that sufficient interest, which they have not done.

JUDGE JOHNSTON: All right.

MR. PLANTE: But, Your Honor, what I would say – what I would respond to is, that's not the issue before the Court. It was limited to satisfactory evidence of upland interests. If the rest of that rule wanted to be used, he could have said that. He narrowed it down to whether or not [36] there is sufficient upland interests, satisfactory evidence.

JUDGE JOHNSTON: Well, right. And my question, I guess, to you is, is your position that you have or you will present, there is satisfactory evidence of sufficient upland interests on the part of

the applicants or are you relying on this provision regarding when government entities conduct beach restoration and renourishment.

MR. PLANTE: We're doing both, Your Honor. There's the exception for police powers and activities such as this by a governmental entity.

JUDGE JOHNSTON: All right. Well, if you're in part relying on that, I'll overrule the objection. You may proceed.

MR. SAFRIET: Thank you, Your Honor.

Q (By Mr. Safriet) Mr. Flood, did you consider such in 18 or Rule 18-2104, subsection 3-B or you don't know what that is?

A Well, I do not know what that is. But my job does not have me reviewing processing, permits.

Q So did you not consider whether or not the City or County had provided sufficient evidence or satisfactory evidence of sufficient uplands, you didn't consider that?

[37] A That was not my responsibility.

Q Whose responsibility was that, do you know?

A It would be the permitting staff that would be administrating that rule.

Q Did you consider whether or not the City and County application provided reasonable assurance of water quality standards?

A Are we talking about the permit applications.

Q Permit, yes.

A I was not involved in that.

Q That would be permitting section, as well?

A Yes, sir.

Q Who did that, Ms. Christoff?

A Ms. Christoff and other members of her staff, Marty Seeling.

Q Is it typical for a beach restoration project to receive a variance for turbidity requirements for water quality standards?

A It's pretty common. But, again, it's a permitting issue. But in my job, working with local governments I'm aware that variances are very often issues.

Q Okay. Because you said you worked on projects, 45, 42, 43 projects, how many of those involve variances, to your recollection?

[38] A I couldn't say.

MR. SAFRIET: No further questions.

MR. PLANTE: No redirect, Your Honor.

MR. MILLER: Nothing from the Department.

JUDGE JOHNSTON: I just have one question on clarification. Do you use both terms, restoration and renourishment, is there a distinct difference between the two?

THE WITNESS: We recognize the initial construction of beach is restoration. We're restoring the beach to a previous dimension. And then we use the term maintenance nourishment to come back in and rebuild it after a portion of it has eroded away. It's common for folks to use the term renourishment but the Department really doesn't recognize that. But renourishment would probably apply to a maintenance nourishment event.

JUDGE JOHNSTON: To your understanding and for my understanding, is this project that we're talking about now that's being applied for, is this a maintenance nourishment?

THE WITNESS: This will be initial restoration.

JUDGE JOHNSTON: Okay. Thank you.

MR. PLANTE: At this time we would like to call Tom Campbell for Walton County and the City of [39] Destin.

THEREUPON:

THOMAS CAMPBELL,

having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. PLANTE:

Q Good morning, Mr. Campbell. Will you please state your name and business address?

A My name is Thomas J. Campbell. And my address is 2487 – 2481 Boca Raton Boulevard, Northwest Boca Raton Boulevard in Boca Raton, Florida.

Q Where are you currently employed?

A I'm president of Coastal Planning and Engineering.

Q And how long have you been president of it?

A Since 1984.

Q Would you please summarize your education, please, educational background since you graduated from high school?

A Yes. I attended the Cooper Union for the advancement of Science and Art. And got a Bachelor's degree in Civil Engineering. Then attended Florida [40] Atlantic University where I got an Ocean Engineering degree.

Q And would you please summarize your employment background?

A Yes. I worked for a firm called and Arthur V. Strock and Associates for 12 years. Upon graduation and worked primarily in the area of beach nourishment and beach restoration design. In 1984, myself

and three other partners started coastal Planning and Engineering. And have been working there ever since. I think I was president at that time, still.

Q When you were with, I believe, you said Strock, was that a Florida company?

A Yes, it was. It was in Deerfield Beach, Florida.

Q Do you have any experience in the planning, development or modeling of beach renourishment and restoration projects?

A Yes. Yes, we, well, I say we, myself and my firm have designed a number of projects in Florida, on the east coast United States, Louisiana and Texas.

Q In your experience, is there any difference between a beach restoration and a beach renourishment process?

A Beach restoration, they're all forms of what's [41] called beach nourishment, which is placing sand on the beach. The beach restoration is the initial – referred to as the initial nourishment of the beach. And then renourishments are the subsequent maintenance nourishment of the beach.

Q Have you ever testified in either a civil action or in administrative hearing?

A Yes, I have.

Q About how many times?

A I have recorded eight. I think it's a little more than that. But that's the ones that we can recall.

Q Have you ever been qualified as an expert witness?

A Yes, I have.

Q In what areas?

A As a Coastal Engineer.

Q (By Mr. Plante)

MR. PLANTE: Your Honor, if I may approach. Here's a copy of Mr. Campbell's resume. And at this time I would like to move the resume as respondent's joint, respondent's joint exhibit number 2 and tender Mr. Campbell as an expert in coastal engineering.

JUDGE JOHNSTON: All right. Without objection the exhibit is received.

[42] MR. SAFRIET: Your Honor, the petitioner –

JUDGE JOHNSTON: Any objection to the exhibit?

MR. SAFRIET: No. No.

JUDGE JOHNSTON: It's received. Any objection to the tender or any voir dire?

MR. SAFRIET: No objection to the tender of the witness as an expert, Your Honor. But I would

just inquire as that the witness is being offered for one of the two issues involved, either the riparian satisfactory evidence, upland interests or the turbidity water quality standards rather than general background information, which already occurred earlier.

JUDGE JOHNSTON: Well –

MR. SAFRIET: You know, I just don't want his testimony to go on about issues that aren't relevant for a long period of time, Your Honor.

MR. PLANTE: Your Honor, his testimony won't go on with anything that's not relevant. His purpose here is plain, he's got a slide show so you can actually visually see what a beach restoration project looks like. And I think that's necessary because he is being tendered as an expert in the area of water quality – well, for his testimony with respect to water quality in a beach [43] renourishment project. In order for you to appreciate what they're talking about, we need a background as to what water quality means and how it relates to a project. His presentation is not very long.

JUDGE JOIINSTON: All right. You may proceed.

Q (By Mr. Plante) Have you ever had the opportunity to apply for a permit to conduct a beach restoration project?

A Yes, I have.

Q On behalf of what entities?

A On behalf of governments, in general. The City in Delray Beach, Boca Raton, Broward County, Captiva Erosion Prevention District, to name a few.

Q In your experience in preparing the application and submitting them to the Department of Environmental Protection or its predecessor, DNR, did the Department sponsor – was it a requirement that the project sponsor obtain an interest in the upland properties or demonstrate such an interest prior to submission of the application to the Department?

A It has not been my experience that that was a requirement or prerequisite.

Q Are you familiar with the beach restoration project that's subject in this Administrative Hearing?

[44] A Yes, I am.

Q How did you become aware of it?

A You contacted me and asked me if I could review the case and provide testimony.

Q So you've been retained by the respondents, Walton County and the City of Destin to testify in this matter?

A Yes, sir.

Q Have you read or had the opportunity review the engineering plans for the project prepared by Taylor Engineering?

A Yes, I have.

Q In reading the responses to the interrogatories that have been submitted in this case by the plaintiffs, the basis for the water quality issues are – were identified as tab H, the water quality study performed by Taylor Engineering. Have you had an opportunity to read that?

A Yes, I have.

Q Before going into the details of that, would you explain – would it help if you showed your slides before going into this?

A I think it would.

Q Okay.

A So we have a basis for discussion of the [45] turbidity aspect.

MR. PLANTE: I'd like him to set up and do that then, Your Honor.

JUDGE JOHNSTON: I'll mark this as respondent's exhibit 3. And this is the print out of the slides that are being testified to.

MR. PLANTE: Yes. You may proceed.

THE WITNESS: It's a little – okay, I'll just go over very briefly the basis of beach nourishment,

and why we do it. Then how it relates to water quality issues. If we get some issues that are not relevant, I'll go over them quickly just to give the concepts. We had talked about the definition of beach nourishment. This may not be in the package that you have because we had discussed – beach nourishment is a periodic introduction of sediment into the beach to restore and maintain the recreational storm protective nature of the beach. So it's the overall general nature of the beach nourishment.

If we look at beach restoration, that's the first, what I view as the first nourishments. So, in essence, that's, you know, when you first go out and do, putting sand on the beach. And then the renourishment or maintenance nourishment as the [46] State calls it, that describes coming back at a later time and redoing the beach. These are important concepts because it speaks to the very essence and nature of the program or project that we're looking at here.

Okay. Beach nourishment has been used for a number of years in Coney Island, was the first large scale project in the 20's. Since that time there's been a number of projects, especially in Florida, 50 nourished areas in Florida, Miami Beach and Panama City.

Almost every State has placed beach – here's volumes from the 1920's through today.

JUDGE JOHNSTON: Just a minute, Mr. Campbell.

THE WITNESS: Sure.

JUDGE JOHNSTON: My exhibit doesn't seem to jive with the presentation.

THE WITNESS: Well, I'll go past them. You'll see some that do jive. But this just gives some background information. Let's see – do you have this one the Miami Beach. Those were exhibits that were just given some time ago.

MR. SAFRIET: That's not in mine.

JUDGE JOHNSTON: So far I haven't found it. That one I have seen.

[47] THE WITNESS: Well, here are some of the reasons for beach nourishment, tourism, and environmental benefits. You may not have see this. It's more current. It's part of the hurricanes 2004. Which, cuts to the essence of why we restore beaches in this area.

Basically we're looking at storm protective benefits. I don't know if you have this slide or not, but it shows that Hurricane Ivan has caused some significant damage, especially in Alabama. And for want of a beach nourishment project, there was significant storm damage.

JUDGE JOHNSTON: Well, basically I don't have any of these exhibits are jiving with the presentation. Well, that one. It's very disorganized. It's not – it's not jiving with the presentation. So I'm not sure how useful it is for the purpose.

MR. PLANTE: Well, Your Honor, if you can just ignore the exhibit and I'd like him to explain the beach renourishment. That would be most of the exhibit. It's a demonstrative evidence and we'll not move that in.

JUDGE JOHNSTON: All right.

THE WITNESS: Panama City Beach was one of the [48] largest beach nourishments in Florida. And it shows the dramatic differences before and after in this picture. Basically, it was a seventeen and a half mile project with 8.3 million cubic yards of material constructed in 1998, '99 time frame.

Panama City Beach did experience impacts from Hurricane Ivan. And they are relatively minor as a result of the beach nourishment being in place. So, this shows some of the protective valued of beaches.

One of the first projects that I have worked on is Delray Beach, Florida from 1973. And that's a classic example of beach nourishment in Florida, where there's been nourishments and renourishments on the beach. This is the description of the process. What we're looking at now is a lazer underwater survey of the offshore areas of Delray Beach. And we can see offshore, where they took the sand to place on the beach there are hulls in the sand bottom and that's the process that goes on. This is the cutter head dredge that would be working to get the sand off the bottom. And basically the mechanism to the left, which is shown there, basically shows – there is a cutter head that goes in, cuts into the bottom and

then moves laterally and cuts the material to place that material up on [49] the beach. So, in essence, in this particular case, sand is dredged in this manner, the cutter head goes back and forth, disturbs the material. And then vacuums up the material and runs it through the dredge and then onto the beach. That's the process that we'll be seeing here. That's the cutter head dredging. There's also a hopper dredge that may be used in this case, which would actually fill itself up with sand. But the cutter head pipeline dredge directly delivers material to the beach.

As is seen here, this is a picture in Captiva Island, where the pipeline comes ashore and you can see in this location here, that's the dredge of the offshore from here. And then pipe is added along the way as the beach is built progressively down. That would be the process that would be followed on the Walton County and Destin projects.

Okay. This is a project probably more typical of the Destin project. It's call the Ebb Shoal Borrow area off of Boca Raton, Florida. And the reason I say it's more typical is because the borrow area is of a similar nature to the Destin borrow area. In essence, it's an offshore sand bar, what we call an Ebb Shoal that's built opposite an inlet mound. The reason that's significant is because [50] those sands are among the most clean sand that one can find in the offshore zone because they've been washed by the process of sand moving along the shore by waves and also by the currents of the inlet. So, when we deal with Ebb Shoal Borrow areas, we wind up with extremely clean

sand, typically. And our review in this case is shown that that's also the case here. Which speaks directly to the concept of turbidity and we'll talk a little bit more about water quality and turbidity in a minute.

This is the picture of the Boca Raton, Florida project being constructed. You can see the dredge sitting offshore approximately here. And the beach progressively gets built. This was from a camera that was located on the beach itself. A camera that took sequential pictures everyday. So you can see the beach gets built approximately 200 to 500 feet per day. And the activity occurs around the up wall of the pipe where the bulldozers move the material to the desired shape. And the beach gets finished in this fashion. So, no individual area, other than the pipe residual pipe sitting there sees activity for more than, let's say a, day's time. So from a property perspective, that would be what will be expected.

[51] I would also like to show you that even though this is an extremely clean situation, that we do see some turbidity or, you know, higher cloudiness in the water, which is basically turbidity of water quality. In this particular case and in the case of the Destin case, that cloudiness of the water will be a temporary event. It was no water quality violations of the State water quality when tested. That water quality was lower than the state standard of 30 NTU's, which is the turbidity standard that's used. Typically, these tests came out to below 5. Between 5 and 10 NTU's for this projects. So, in essence, because the material had low silt. The actual disturbance of

that water quality was temporary and at a very low level.

JUDGE JOHNSTON: What does NTU stand for?

THE WITNESS: Nephelometric Turbidity Units. Now, I'm not sure what that means or how to spell it. That was measure of the turbidity. And 30 was the State standard that we try to keep below. Now, in this project, also, we had originally applied for a larger mixing zone. But after looking at the sand tests from the ebb shoal itself, because the silt quantity which is very fine, it was so low, we agreed with the state that we would withdraw our [52] application for mixing.

So we wound up getting a standard mixing zone, which is an area that can exceed 30 NTU's of 150 meters. And were able to stay within the state limits in this particular project because of the high quality of sand and the low percentages of silt that rose in the material.

In other projects, we almost always apply for a mixing zone larger than the 150 meters. And in other projects we actually need larger areas to allow the silt to settle out. But in the case where we have an inlet Ebb Shoal, which has one percent or less silt, it generates very little and very temporary disturbance of the water quality.

JUDGE JOHNSTON: Are you saying no mixing zone in this case, meaning the Boca Raton case?

THE WITNESS: The Boca Raton case and the Destin, Walton County case. Both follow similar procedures. In other words, both applied or both projects applied for early mixing zone. Both, after discussion with the Department withdrew their application for mixing zone when the nature of the material was further reviewed and analyzed. And so I would expect, my opinion being here, that there would be very little disturbance of water quality [53] and it would be temporary. And I'm talking now about the Destin case here.

JUDGE JOHNSTON: Okay.

THE WITNESS: Also, the Boca Raton project performed very well in the storm – the storms of this year. Okay. I thought I would make sure and get elements of the case. We don't need to go into this but these are the elements of beach nourishment development that are typically done and have been done in this by Taylor Consulting.

We have reviewed their work and found that they have accepted the post construction and the actual construction itself, they've performed all of these duties. And in review of the documents, I found that they had, also, looked at all of these – all this information in complying will [sic] the engineering developments of the project.

JUDGE JOHNSTON: Okay.

Q (By Mr. Plante) Mr. Campbell, I just have a couple of questions for you to clarify.

A Sure.

Q In simple laymen's terms, what is water quality?

A Water quality, as it relates to the beach restoration, water quality can have a lot of meanings [sic]., [54] but in the case of beach restoration, the water quality refers to the level of cloudiness or turbidity that could be caused by the dredge and fill process. So, in essence, there is a certain standard that the state would prefer to have, which is less than 30 – less than elevating that turbidity level or cloudiness level above the ambient condition by about 30 NTU's.

Q You mentioned when you're talking about the offshore – the Ebb Shoal material is coming from?

A Right.

Q And you mentioned the one percent factor. What is that?

A Well, the sand always has multiple grain size characteristics. In other words, it's not just a single grain size. It starts from a courser material and it peaks at a certain, what we call the mean grain size and then the other side of the – takes you out to the very fine material. So when you look at the tail end of the distribution from the course to the fine, the very

fine material is called silts. And the amount of silts, when you dredge sand, for example, and place it on a beach or place it any place, the very large particles fall out right away because your dredging 80 percent water and 20 percent or less sand. So when the material first comes out of the pipe, it has a lot of water in it. So it's [55] moving. And in order to keep the sand suspended in the pipe, there has to be a lot of water. Well, as soon as it comes out, the water separates from the sediment. The very courser materials, falls right out onto the beach. The little bit finer material, may fall out in the near shore submerged area and the silt doesn't tend to fall out right away. So, in other words, there's enough motion of the water so this very fine material stays in suspension for some time. And so, when in looking at a beach nourishment project to determine whether or not we'll have a lot of suspended sediment, i.e, increasing that turbidity of cloudiness level, we look at that percent of silt, which is the very fine material and say, you know, it will be directly dependent or how much silt we have in the mix, okay. And when you go to Ebb Shoals, they have been watched by various – they've been created by sand movement down the beach getting trapped or captured by the inlets. And that sand has seen a lot of washing, if you can imagine, with all of the waves moving the material. And then when it gets to the inlet, it gets a second amount of washing because there's an ebb and a flow tide going across the ebb and the flow shoal. You have ebb shoal being the offshore sand bar and the flood shoal being the interior sand bar. So because of the multiple washing events you'd expect, ebb

shoal and [56] you do fine, to be very low in that silt fashion, is very little of that fine material that causes or can cause the heightened turbidity levels. So when we're using ebb shoals, we have less of a problem generally, you know, of causing elevated turbidity levels and possibly violating state standards for the – for the use of it. And so therefore we would expect, in this case – now, I've also reviewed the multiple vibrator or sand samples that were taken for this case. And I made my own review of that because I felt it was important to be able to testify to what I saw relative to the samples themselves.

And sample after sample, test after tests showed silt levels less than one percent. And in some cases, not even a trace of silt was found in the samples taken from the ebb shoal. So, it appears to me that there will be only a temporary disturbance, you know, maybe a little bit of cloudiness in the water at the discharge points where the water reenters the Gulf. And that will dissipate very quickly. If you were to shut down the dredge, for example, for an hour, you would find that the water would be back to its background conditions. And that differs from other areas where they have up to 5 percent silt in the offshore areas.

Q During the dredging process, is the public allowed in the immediate area where all of the sand is [57] being put out?

A Generally not. Because it's bulldozers and big heavy equipment moving around. So it's important to

keep the public safe. So, generally they'll restrict maybe a 500 to a 1000 foot area from the public during the construction. Now, that area moves down the beach, you know, any where from 300 to 500 feet per day. So it's not the same area, but it's another area. The public can, however, swim in the waters opposite that area. But generally you don't have access to it because they're not up on the beach itself. The turbidity is not, the measure of turbidity is not concern for public safety or public health. It's more a concern for venatic organisms, the bottom critters and that sort of thing. And generally, from my experience has been more of a concern where there's hard bottom habitats, like reefs and those kind of things. In this case, there isn't hard bottom habitats to be concerned about. So from that standpoint, you know, they should have qualified in the sense for variance because there's nothing to be affected, in a sense. But because they had such low silt, there was no reason to grant the variance.

Q In your experience, the permit as issued without a variance, is that stricter than had a variance been given?

[58] A Yes, it is. Yes, it is. Because that would require the contractors to react earlier to any disturbance of water quality. In other words, he would have to – within 150 meters of the beach or of the discharge, have to take samples. And then if he found that the – that there was a condition that warranted reaction, he would have to react right away. As opposed to with a variance, where you

might be 500 feet down the beach, it would take a long time for the reaction to change the conditions. Whereas, this is much more stringent.

Q So, one final question, water quality is not related to public health or safety?

A That's correct.

MR. PLANTE: Okay. No further questions.

MR. MILLER: Nothing from the Department.

MR. SAFRIET: I have a few questions, Your Honor but if you want to take a break so Mr. Campbell can move his equipment, that will be fine.

JUDGE JOHNSTON: Yes.

(Short recess taken at this time)

(Back on the record)

CROSS EXAMINATION

BY MR. SAFRIET:

[59] Q God [sic] morning, Mr. Campbell. You stated earlier that you had reviewed the file and the water quality samples and soil samples and sand samples and all that information; correct?

A That's correct.

Q And you said that you reviewed exhibit H, which was the initial application for variance?

A Right. Attachment H.

Q What information was that exhibit H based upon for variance?

A It was based on a computer analysis of the potential for movement of turbidity or disturbed water quality down the beach.

Q And is that something commonly used – something commonly used in the practice?

A It can be used. It's not common.

Q Okay. And what was the results of Taylor Engineering Analysis in exhibit H?

A They made the analysis to see at what point down the beach, the water quality would return to an ambient condition that was not disturbed.

Q And the result of that was 1660 meters; correct?

A Let me see. I believe they asked for a mixing zone of 5,445 feet.

[60] Q Okay.

A 1600 meters, that's correct, yes.

Q For consistency purposes, a foot equals how many meters, if we convert that to meters?

A Approximately 3.

Q So .3048, does that number sound right, one feet equals .3048 meters; is that the conversion?

A That sounds correct.

Q Well, if we would convert that and I'll share with you we're not going to do that on the stand, it would come to 1660 meters; does that sound –

A Yeah. That's correct, 1660 meters.

Q So we use 1660 meters, so Taylor Engineering decided in their analysis that 1660 meters for turbidity to return to its regular state; correct, from the point of discharge?

A Based on the assumption that it was 5 percent silt.

Q On their analysis. And the standard mixing zone is 150-meters; correct?

A That's correct.

Q So, you're testifying their analysis was 1,510 meters off?

A No.

Q Did you perform an analysis?

[61] A No.

Q Then what is your basis for testifying that the turbidity will remain within the 29 NTU's, within the 150 meters to be performed on the analysis?

A Because there is virtually no silt in the sand. This attachment H, made an assumption that it was 5 percent silt.

Q How much silt is in the sand?

A Less than one percent.

Q And in all the samples?

A Virtually. I paged through all the samples that I saw and there was only 1 or 2 samples that had one and a half, two percent. But many, many samples had significantly less than one percent. So, I think the reasoning is 5 percent is in the early analysis the 5 percent is the limit the State requires. If you had more than 5 percent silt, you would – you would not be able to get permitted for the project. So use that as kind of an outside limit. And given that 5 percent silt, assumption, they ran this analysis and said here's the mixing zone I would need if I had 5 percent silt.

Q And your analysis was cursory review of the samples to determine, maybe one percent silt?

A Correct.

Q So you don't do a comprehensive analysis of [62] every sample adding up the percentages for all the samples, did you?

A That's correct. But zero is –

Q Thank you. You stated earlier that in the Boca Raton case project that you had worked on that the mixing zone was 150 meters; correct?

A Yes.

Q And what was the name of that project?

A Boca Raton inlet or Boca Raton sand, something like that.

Q Boca Raton Central Beach restoration project?

A No.

Q Was that a different project?

A Yeah.

Q In the Boca Raton Central Beach restoration project, did you work on it?

A Yes.

Q Was there a variance granted for turbidity in that case?

A I don't recall.

Q Okay. Let me hand you the permit issued by the Department in that case. How close is the Boca Raton Central Beach restoration project to the one that you testified to?

A To the inlets, it's probably about a mile way.

[63] Q A mile away, okay. And if you turn to page 9 of 21, actually 8 of 21, I'm sorry, in that case the Department had monitoring requirements for the beach disposal area 300 meters offshore and 1000 meters down current; correct?

A Yes.

Q So that was a variance offshore as well as downgrading; correct?

A I'm not sure that that constitutes a variance. It talks about a compliance or monitoring requirement.

Q Did you – you said you worked on this case; correct?

A My company did, yes.

Q Your company did, but you didn't personally?

A That's correct.

Q Okay. What are the monitoring requirements in the current permit?

A I don't know what the monitoring requirements are in the current permit.

Q Did you review the current draft on that one?

A I reviewed the intent to issue.

Q But you didn't review the draft permit?

A Huh-uh.

Q What are the monitoring requirements in the intent to issue, are there any?

[64] A I didn't see any.

Q You stated earlier in your testimony that you worked on the Panama City restoration project?

A That's correct.

Q Was a variance granted for that project?

A I know we applied for one. I don't know if we got a variance issued for that or not.

Q The Panama City Beach area, is the sand in those areas similar to the sand here in the Destin area?

A The sand on the beach is similar. The sand in the offshore area is a different type – different type of borrow site. It was an offshore versus ebb shoal and borrow.

Q But you're not aware if the variance granted, if one wanted was granted?

A I can't recall if a variance was granted in that case.

Q Would it surprise you if a variance was granted in that case?

A If it was not?

Q If it was or was not, would it surprise you if it was, one was granted?

A It wouldn't surprise me either way because that's a negotiation with the Department.

Q Okay. Are you familiar with the Pensacola [65] Beach restoration project?

A Vaguely.

Q You didn't work on that project?

A No.

Q How many projects have you granted variances that you're aware of, beach renourishment projects for turbidity?

A I don't know that answer.

Q How many have you worked on, beach renourishment projects have you work on?

A I'd be guessing the answer to that. I'm not sure. Probably, may be five or six, something like that.

Q How many of those required variance for turbidity?

A How many have I worked on, I've worked on 30 but how many have required the variance for turbidity, I don't recall that number.

Q Okay. Does the Department typically require an analysis of the turbidity, a detailed analysis?

A They don't require detailed analysis, necessarily. They ask for some evaluation of expected turbidity and you could provide analysis of turbidity based on the amount of silt and the conditions at the site. In this case they didn't.

[66] MR. SAFRIET: Thank you. No further questions.

JUDGE JOHNSTON: In this case they what?

THE WITNESS: They didn't. They did a detailed analysis using a model.

JUDGE JOHNSTON: Okay.

MR. PLANTE: I have no further questions, Your Honor.

JUDGE JOHNSTON: All right. Thank you. You may be excused.

MR. MILLER: Your Honor, at this time the DEP would like to call Mr. Martin Seeling.

THEREUPON:

MARTIN SEELING,

having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. MILLER:

Q Would you state your name and business address, please?

A Martin Kenneth Seeling. I work at 5050 West Tennessee in Tallahassee.

Q And would you state your occupation and official title?

[67] A I guess you would call me an aquatic ecologist. And I work for Department of Environmental Protection, Bureau of Beaches and Coastal Systems. And I am the administrator of the Environmental Permitting Programs.

Q And how long have you held that position?

A Probably about six years now.

Q And prior to that position what, if any, other positions did you hold within the Department?

A Well, let's see, I started off in the dredge and fill program as a permit processor. And then I became the supervisor of field inspectors for the dredge and fill program in Jacksonville. Then I moved to Tallahassee as the Transportation Coordinator where I worked as the liaison between the Department and DOT for their roadway projects, as well as utility projects. There I processed permits and worked on rules that involved transportation projects.

Let's see, then I became the training manager. I changed jobs right at the time where the Legislature asked the Department to combine some programs to create environmental resources for that program. So I was on the committee to write those rules. And then afterwards, I would train Department staff or State on how to implement Environmental Resource Permit Program. Then I moved over to the Bureau of Beaches.

[68] Q How many years total have you worked with the Department?

A About 20.

Q And can you briefly describe or summarize your job duties right now?

A As I said, I'm the Administrator, permitting environmental permitting programs. And that includes dredge and coastal permits, environmental resource permits for ports. And wetland resource permits here in the Panhandle, when it's not beach related. Generally, I supervise the permit processors, make sure that they're review is thorough and correct and edit the documents.

Q Can you just briefly describe your educational background?

A I have a Master's of Science in Environmental Science. My major was Water Resources. My concentration was Limnology. It's the study of fresh water. And then my Bachelor's was in Biology with a concentration in Aquatic Ecology. I've also done some post-graduate cost work in engineering and wetland ecology.

Q Mr. Seeling, are you familiar with the Statutes in the Administrative Rules that apply for permit processing under the joint coastal permit program?

A Yes, I am.

Q And can you kind of give me a little rough [69] overview of the joint coastal permit program?

A Again, the Legislature was trying to streamline the process so we could eliminate some duplicative permitting programs. So we combined the dredge and fill side with the coastal construction side. And when I say dredge and fill side, I'm talking about wetland resource permit in the panhandle and environmental resource permit programming in the peninsula of Florida. And that also includes the sovereign submerged lands reviewed under the same application. Do you want the coastal permitting process or just the program side?

Q Well, whatever you believe is relevant.

A Well, I can go through the permitting process, if you're interested. It's basically the 120 process where we have 30 days after we receive an application to review it for completeness. When I say completeness, we're talking about how well do we understand proposed project. We also review the potential impacts for minimization of those impacts. And at the same time we make the determination if it meets the permitting criteria. The permitting process is also associated with the coastal zone management program, which is a Federal program to determine if it's consistent with State law. So, we circulate the application to other agencies who review it under their program and then they ask questions [70] to our RAI processor, Request for Additional Information processor. Eventually, they make a determination that the project is consistent with their rules. And that's documented in our fine print.

Q And you mentioned that you're familiar with the Statutes and Administrative Rules that apply to the joint coastal permit program. Do you interpret and apply those Statutes and Rules to the permit application on a daily basis?

A Yes, I do.

MR. MILLER: May I approach, Your Honor?

JUDGE JOHNSTON: Yes, you may.

Q (By Mr. Miller) Can you identify that for me, please?

A That's a copy of my resume.

MR. MILLER: Your Honor, I'd like to introduce Mr. Seeling's resume as respondent's joint exhibit, I guess, it's number 3.

JUDGE JOHNSTON: If you've withdrawn the power point, we'll make it number 3 then.

MR. MILLER: Right. Also, Your Honor, I guess that's admitted?

MR. SAFRIET: No objection, Your Honor.

JUDGE JOHNSTON: It's received.

MR. MILLER: Also, at this time, Your Honor, [71] I'd like to tender Mr. Seeling as an expert witness in the application of the Statutes and Rules as they apply to the joint coastal permitting process.

And also as an expert witness in the processing of beach restoration applications.

JUDGE JOHNSTON: Any objection or voir dire?

MR. SAFRIET: Yes. The same objection, Your Honor. The application of the Rules doesn't require expertise. To the extent that Mr. Seeling has years of experience in processing these, that [sic] to the weight his testimony. It doesn't necessarily make him an expert.

MR. MILLER: Your Honor, the Department should be given deference as how they interpret the Statutes and Rules that apply to the permitting process. And Mr. Seeling has plenty of years experience interpreting and applying those rules.

MR. SAFRIET: Again, that goes to the weight, Your Honor. It doesn't make him an expert in that.

JUDGE JOHNSTON: If that's an objection I'll overrule it. And if there are – if there are opinions that are relevant I'll receive them and you can argue about the weight that I should give to it.

Q (By Mr. Miller) Mr. Seeling, can you give a brief description of the history behind the beach [72] restoration project that's at issue here today?

A Yeah. I believe we received the application approximately two years ago. Jamie Christoff was the permit processor for the project. And she reviewed it

for the initial 30 day completeness review. Circulated it to the other agencies and in house experts. We have a number of different experts departmentalizing on a review. I reviewed the application for completeness and reviewed her initial RAI. After that, Ms. Christoff, handled most of the subsequent RAI's.

As I recall, one thing that kept it incomplete for sometime was, we were waiting for the biological unit from the Fish and Wildlife Service.

JUDGE JOHNSTON: That's a live mike. If you'll pull it closer and it will help everybody to hear you.

A (By the Witness) So we were waiting for that determination. That's what kept it incomplete for a while. During that process, the applicant also requested a variance to the mixing zone, limitation of 150-meter mixing zone.

Q We'll get back to that.

A I believe it was complete around nine or ten months later. And we issued an intent to issue approximately a year ago.

[73] Q Okay. One of the issues of concern raised by the petitioners is of turbidity and water quality standards. Can you explain to the court how turbidity and water quality concerns relate to the proposed restoration project?

A Okay. I know Tom was talking about turbidity. Do I need to go into any detail into what is turbidity and what causes turbidity.

Q Briefly, if you could?

A Well, turbidity is basically water quality standards to protect aquatic resources. It kind of measures light attenuation. Actually, the way we measure it, we measure the reflectants rather than the penetration. But light attenuation is the main issue. So, we're concerned that if we have a turbidity plume, is that going to shade out sea grasses or corals or something like that. When you have – if you take some rocks and throw them in the water, they fall to the ground, right. If you take some talcum powder, it stays floating and settling in the water. It doesn't settle out very quickly. So it's the size and shape of particles that determines how quickly material stems out. If you have a fairly course material, they will settle out very quickly. If you have fine material, it stays suspended longer. So, you have a turbidity plume, that [74] moves with the current.

Again, we have course material, material that has one percent fines is considered very fine material properties, as good as you'll find anywhere in the State of Florida.

Q You mentioned a couple of specific harms that are associated with turbidity. Is public health one of those?

A It really doesn't affect public health. Public health, safety and welfare are some of the factors that we have to consider. But there's really no adverse impact to public health associated with turbidity.

Q Are turbidity and water quality standards taken into consideration by the Department whenever a restoration project is permitted?

A Right. Every time.

Q Has the sponsor, Walton County and City of Destin provided the Department with any assurances that turbidity and water quality standards will not pose a significant problem or a significant adverse impact to the health and welfare of the public or any other natural resource in the area of the proposed project?

A Yes, they have. The application included a geotechnical analysis of the borrow site. By the way, the borrow site is – the ebb shoal, which means that the [75] sand moving along the beach and along shore transport, once it gets to east pass, it gets kind of jetted out and forms a sand bar or shoal. It's basically the beach sand, the well washed beach sand. And we're talking about some of the nicest beaches in the State here. So it's basically the beach sand that piles up off the inlet and gradually it works its way back to the beach. But it kind of intercepted for a while.

So, they wanted to use that material as a borrow source and place it back onto the beach. Basically, speed up the bypassing, natural bypassing process.

And they took core samples and evaluated the quality of the material. And, again, we've determined that it's very fine quality material. It's not fine material, but good quality material.

Also, they've agreed to do turbidity monitoring at the edge of the mixing zone. If turbidity is ever exceeded, the work has to stop immediately, the permitting would have to report to us. And if this happens more than once, we would have them stop work until they found some way to fix the problem. All though we don't expect that to occur here. They're also doing a quality control, quality assurance plan, which means they will be measuring the quality of the sand as it comes out of the pipeline well before it can cause a turbidity [76] problem. So if they run into any pockets of bad material, which is unexpected here, then they could stop the work before there could be a turbidity problem.

Our geologists looked at it very thoroughly. And, again, this is basically sand from the beach that ends up in this ebb shoal. A geologist will have some idea, if there could be lenses of bad material. If it were outside of a river, you might find pockets of bad material. But in this case, that is unexpected.

We also have determination surveys for hard bottoms or sea grasses to check and see if they're in the vicinity and there were none. Also –

JUDGE JOHNSTON: In the vicinity of the source or the placement?

THE WITNESS: Both. At the borrow site, the vicinity of the borrow site and in th [sic] beach area and on the near shore. I believe they did side scan sonar tests. In this part of the panhandle, we don't normally have coral reefs or hard bottoms. There are some small ridges, usually out in deeper water. So, we wanted to make sure that there weren't any in the borrow area. So we did side scan sonars which would have determined if there were any structure out there.

Q (By Mr. Miller) So is it correct to say then is [77] one of the assurances that has been provided or discussed with the Department is that there are very few natural resources that may possibly be covered by the turbidity as it settles out?

A Right. There are none in the vicinity within the reach, the potential impacts of this project.

Q Are there any assurances that you can think of that –

A Yeah. The shore parallel sand dike that is basically piling up sand, building a wall right along the shoreline. The sand is pumped onto the beach, you know, water sand slurry, which washes back into the Gulf. And this wall that's built along the shoreline, will keep it from washing right back in, moves down shore. Some of the water peculates, most of the material settles out, then eventually gets back into the Gulf. Basically, gives it more time for the sand to settle out.

Q Kind of a filtering device; is that correct?

A A settling device, yeah.

Q Opposing counsel had mentioned the Pensacola and Panama City projects. Did both of those projects require variances?

A Yes, they do.

Q Could you tell me why those projects require variances and may be distinguish between this project [78] itself?

A Sure. Well, Panama City it was the sand quality issue. They weren't blessed with the kind of sand that we have here near Destin. The material coming out of the Apalachicola River is very silty. And it's washed away gradually as it moves westward. And by the time it gets to Panama City, there's still some silts in there. So they had very borderline sand. In fact, they ran into some bad batches there. They've had to stop that project a number of times. So, the core is building on now and that they've done new testing to make sure that they don't run into that problem again. So, they were not able to meet 29 NTU's within the 150 meters.

So, we're allowed by rule to give them up to 150 meters. And beyond that, we have to give the variance to the rule. Since their turbidity flumes [sic] were going to be larger because of the fine material, we had to extend it. In order to get a variance to that rule, you have to justify it.

Q Let me stop you right there. Can you just explain what variance is?

A A variance as a way of saying this rule isn't – can be changed in this case for certain reasons. And those reasons are there are no practical means available to meet the Rule. And that it's not going to [79] do any harm, that the intent of the Statute can still be met if we change the Rule.

Q Let's go back to the assurances in the Pensacola project. Can you distinguish the Pensacola project from –

A Yeah.

Q This project?

A Again, the sand was a little siltier there than it is near Destin. But it is still better than Panama City. However, in that area they have outstanding Florida waters. And the standard to meet, is you have to meet background levels. You can't have any turbidity above background at the edge of the mixing zone. So, they weren't able to meet that and they had to get extended mixing zone to allow us – to allow them to have larger turbidity flumes [sic].

Q So 29 NTU's is the standard that's associated with this project; is that correct?

A That's correct.

Q I know we heard the word 30 a couple of times, I think 29 is correct?

A It's 29. And that's the nephelometric turbidity units. That's is what NTU stands for.

Q So, without variance whatsoever, the turbidity can reach up to 29; is that correct?

[80] A Yeah.

Q Now, is Pensacola –

A Twenty-nine above background.

Q Above background.

A So if background is five and you add five to 29.

Q So, would Pensacola, because it's a – you called it a –

A Outstanding Florida waters. It was zero.

Q So it was zero there?

A Yeah.

Q Any other assurances that have been discussed with the Department?

A Regarding turbidity?

Q Right.

A I can go into detail on those.

Q No, that's all right. I was just looking for a few of them. How about compliance with the Rules and Statutes, is that considered assurance as long as they've complied that shows an assurance that –

A Yeah. We review the project to see if there are any potential impacts. And we make sure that we have addressed those. That we have assurances from the permitee and applicant at that point that they will meet those rules. We also have criteria for issuance and [81] before we issue an intent, we have to confirm that they have met those criteria.

Q Do the assurances that you've just discussed need to be enumerated or actually written out within the permit itself?

A Not necessarily. The application includes their design, their construction methods. Most of those details and general condition, it requires that they adhere to what they proposed in their application. Sometimes we might want to emphasize some of the protectoral measures. And in those cases, we will document that in a permit condition. Like the shore parallel dike. That's required as a permit condition, just to emphasize it. But they would have had to do it anyway because they proposed it. The wildlife protection measures aren't necessarily proposed by the applicant, but they are imposed by the resource agencies. So those are specific conditions, also.

Q At some point in time, did the sponsor request a mixing zone variance for this project?

A Yes, they did. On most – every application we get for beach projects requests a variance.

Q What was the Department's position related to that request?

A It wasn't needed. Again, in order to grant the [82] variance, you have to show that they're unable to meet the standard normally. That was not the case here. And, also, if you give a variance, you have to show that it's still going to meet the intent of the Statutes undermining rule.

Q Is it fair to say then that the project is now without a variance, then the project is actually under stricter standards than it would be if it was issued – a permit was issued with combination or in combination with a variance?

A Exactly. In this case, we're not allowing a large turbidity plume. We're requiring them to keep the turbidity plume to the absolute minimum. By giving a variance for a larger mixing zone, we're allowing them to spread the turbidity plume over a larger area.

Q Will the turbidity levels and water quality be regularly monitored as part of the permit?

A Right. I believe that water quality monitoring for turbidity is every six hours at the borrow area and at the beach site. And, again, if they ever exceed the standard, they have to stop work and notify us immediately.

Q I know you mentioned earlier they measure reflectivity, but can you kind of give a little explanation how this monitoring is actually carried out?

[83] A Right.

Q Is it with divers?

A No. They usually just take a boat. And they – we have a current, long shore current, that runs along these areas, so you can predict. And sometimes that changes with the tide. But predominately, the water it [sic] moving in one direction. So you go in the opposite direction, the under side to get an unbiased background sample. Then you go in the other direction, you follow the direction of the flow from the source. Either the dredge or the point of discharge into the Gulf. And you follow any plume that you can find or the direction of flow if there is no evident plume. You collect the sample at the edge of the mixing zone. And you put these into this meter in which, again, measures the reflectants and essentially, it tells you how much turbidity is in the water. Compare the two and make sure it's C-29.

Q Mr. Seeling, what would happen if the monitor found levels greater than those allowed under the permit?

A The permitee would have to stop work. They would have to report it to us immediately. They have to wait until turbidity plume is gone before they can start work again. And as I mentioned earlier, if this happens more than once, if there's a trend, then we'll ask them to change their design, change their methods to make sure [84] the problem doesn't happen any more.

Q Is it possible the Department would come in and enforcement proceedings if compliance –

A We have the authority to do so. We don't normally take enforcement action with one exceeded because it's not intentional. If they didn't stop work, we would probably take enforcement action.

Q You mentioned that you are familiar with or is it correct that you're familiar with the file that's involved with this issue?

A Correct.

Q Or this project. And what capacity have you been involved with the processing of the permit itself?

A Basically, I supervise the permit processor. I make sure that all the issues are addressed, that the criteria for issuance are met. And our decision or recommendation to issue the permit is valid.

Q And it's your opinion that the application has been properly processed?

A Yes, it has.

Q Let me talk about the application itself. Is the application generic in nature such that some information required on the application may not be applicable to the project at hand?

A I'm sorry. Could you repeat that?

[85] Q Let me – I'll restate it. Is the application itself generic in nature such that some information requested may not be applicable to all joint coastal permit projects?

A Yeah. The JCP application form is used for many different types of projects and many different types of applicants. Sometimes we have an individual homeowner. Sometimes we have a municipality or County and sometimes it's the Federal Government, the Army Corps of Engineers. They all have different abilities and responsibilities. Also, some of these projects that require a dredge coastal permit may be dredging in the inlet. They may be construction of a break wire or groin, sometimes beach renourishment. In this case, beach restoration.

Q Does the Department have the ability to waive inapplicable –

A Yeah. The application tries to address the full gambit of potential questions, and they don't all apply to each project. So, we have, in the application form it says that they can request a waiver of a requirement. They can say it's not applicable. They can defer some items if they're not readily available.

Q Is the file complete as to all the required information?

[86] A That's correct. We know everything we needed to know about the application.

MR. MILLER: No further questions, Your Honor.

THE WITNESS: May I add something else? It occurred to me. I was thinking, I wish I could have brought a jar test. A lot of times –

Q (By Mr. Miller) Well, explain what is a jar test?

A Well, you take a glass jar and you put some sand in there, shake it up and see how quickly settles. And if we could take some sand from this east pass borrow shoal.

Q Is that the borrow area?

A Yeah. The borrow area. Put it in there and take some sand from, say, Panama City, and I put it in two jars and shake them up, by the time I finish the explanation, the sand from the Destin project would have already settled out. And it would take the Panama City jar hours to settle out.

Q So, it's your opinion then that any turbidity plume that may have happened along the project area will settle out in less than an hour, in that area?

A The water is moving and the jar is sitting still. It has part of it to settle out, but it will settle out very quickly. Again, this is the finest sand [87] we've seen in the State.

MR. MILLER: No further questions, Your Honor.

MR. PLANTE: No questions, Your Honor.

CROSS EXAMINATION

BY MR. SAFRIET:

Q Good afternoon, it's still morning. Good morning, Mr. Seeling. How are you?

A Good morning.

Q A couple of questions for you. You testified earlier that you supervise the permit processors in a supervisory capacity?

A That's correct.

Q Did you personally review the entire application in this case?

A No, I did not.

Q Did you draft the – draft the initial permit?

A I did not draft it, no.

Q Did you review it?

A Yes, I did.

Q The Notice of Intent, did you draft it?

A I did not draft it.

Q Did you review it?

A Yes, I did.

Q Did you authorize its publication?

A The citing of it, I recommended, yeah, yes, I [88] did.

Q Okay. Let's discuss turbidity a bit since that was an issue on the prior examination. You had stated that the amount of silt, as the previous Mr. Campbell did, was the indicative factor that no variance in mixing zone would be needed here; correct?

A That's correct.

Q High quality of sand?

A Yeah.

Q What is the amount of silt in samples from the borrow area?

A As I recall, it was approximately one percent fine material. And fine material is defined by the size of material. We have sieves and if it settles through the screen of the sieve, then it's considered fine.

Q What was the amount of silt in the Pensacola case?

A I don't recall exactly, but it was higher.

Q And what about the Panama City case?

A It was borderline. Almost unacceptable.

Q But you have no qualitative data to compare one percent versus 5 percent or 8 percent or 9 percent of those cases, do you?

A If I could check the files I could tell you for sure. But I would guess that Panama City was around 5 [89] percent.

Q But you haven't checked those files so your testimony here is just a guess?

A That's correct.

Q You said earlier that turbidity monitoring will occur at the edge of the mixing zone. Presumably in this case, the edge is 150 meters, both offshore and down current; correct?

A Correct.

Q And you said that was required as a reasonable assurance; correct?

A Correct.

Q So that there's no monitoring required by the permit, then there's not a reasonable assurance provided in turbidity?

A That's not correct. This is additional assurances. But we have other assurances.

Q I'm talking about the turbidity monitoring, the reasonable assurance that the turbidity will not be violated at the turbidity standards?

A That's correct. Geotechnical information about the sand and there are projects where we wouldn't require turbidity monitoring.

Q In this project have you required turbidity monitoring?

[90] A If you'll note, the original draft of the permit did not require turbidity monitoring. We

added it approximately a week after we issued the intent.

Q So you amended the draft permit to include turbidity monitoring?

A Just to be extra careful and extra safe, we included it.

Q Okay. Do we have a copy of that revised draft, do you have a copy of it?

A Yes, I do. Again, we revised that probably within a week after issuance of the intent. We posted it on our web page.

MR. MILLER: Is this it, Marty, that you handed me?

THE WITNESS: I have one that highlights the changes. I did hand it to you. Yes, that's it.

Q (By Mr. Safriet) Thank you. Can you point me to the portion of the revised draft that requires this monitoring?

A It should be in blue font toward the back.

Q I found it now on page 19 of 23. And when was – this happened again one week after the initial issuance; is that correct?

A I believe it was approximately a week. Jamie may be able to recall better than I. But I think it was [91] before we received the petition.

Q Was there any new notice published after this amendment?

A No. It was not needed.

Q You stated earlier in your testimony, I'll give this back to you or do you want it?

MR. MILLER: I'll take it.

Q (By Mr. Safriet) You stated earlier in your testimony that part of the reasonable assurance was the fact that no natural resources would be adversely affected; is that correct

A That's correct.

Q Has there been a comprehensive study of the natural resources in and around this beach area that will be affected by the turbidity?

A Again, we have experience with lots of projects in this area. And we're not familiar with any hard bottom in the area. Sea grasses are often found in the bays, but we don't expect that this project would affect those areas. We asked for confirmation with the size scan sonar determination, which found no structure in the area.

Q Just because no structure is in the area doesn't mean that that organisms is [sic] not present; correct?

A Well, there are organisms in the sand. But [92] there's no – the organisms that will be effected [sic] by light attenuation are not found in this area.

Q All right. Would the placement of the sand on top of these organisms in that area adversely affect those –

A These organisms live inside the sand, under the sand. They're worms and mollusks.

Q You stated earlier in your testimony that the application in this procedure is generic and various portions of it can be waived that are unapplicable [sic]?

A That's correct.

Q Did you review the portions of this application related to whether or not the City and County have provided a sufficient evidence of upland interests and is that term satisfactory evidence of sufficient upland interests?

A It's not required.

Q It's not required; why not?

A Because they are not the riparian owner and they're doing the restoration project. I believe in 1821-004, I'm not sure exactly, it says when you have to do that and when you don't have to do it. If you are the upland property owner and you want to do a structure on sovereign submerged lands in front of your property, you have to demonstrate that you are the property owner, you [93] have interest in that upland property. That's not the case here. If an Agency wants to do some work in those areas, they don't – if they're like building a road in front of that person's property or doing some other kind of

structure, then they have to provide that. But not during the application process. They have to provide that later on.

Q Let me interrupt you there and let me show you the regulations that I believe you pointed me to. And I think the Court and everyone looked at earlier. And that is 18-21004 subsection 3, which is entitled riparian rights and then B?

A That's correct.

Q Okay. So, you're telling me the first sentence of B – well, let me ask you, the first sentence which states satisfactory evidence of sufficient upland interest is required for activity on sovereign submerged lands, riparian to uplands unless otherwise specified in this chapter; correct.

A Correct.

Q Okay. Where else in this Chapter does it specify that the City does not have to provide this sufficient or satisfactory evidence of sufficient upland interests?

A In the last sentence of that paragraph.

[94] Q Okay. And that takes us to the last sentence and I'll read it again, satisfactory evidence of sufficient uplands is not required for activities when a governmental entity conducts restoration or enhancement activity, provided that such activities do not unreasonably infringe on riparian rights. That's what it says; correct?

A That's correct.

Q Okay. Did the Department determine whether the riparian rights were infringed upon?

A I believe you could conclude that that determination was made. We didn't spell it out in the intent, but the riparian owners access to the water and view of the water was not impaired.

Q I'm not suggesting that it has to be stated that, I'm asking whether the Department did it; did the Department consider –

A Yes.

Q Those rights?

A Yes.

Q Who at the Department considered whether those riparian rights were unreasonably infringed?

A It is part of the process that the permit processor conducted and I reviewed to conclude that there was no damage.

[95] Q Did you, yourself, conclude that there was no unreasonable infringement on riparian rights as a result of the beach renourishment project?

A Not in so many words. Not in writing. But, again, we issue the intent once we make those determinations.

Q Is it your testimony today that this beach renourishment project does not unreasonably infringe

on the riparian rights of those owners along that 6.9 mile stretch?

A Yes.

Q What riparian rights did you consider when you –

A If you'll look through the Rule, you'll find reference to – access to the water, access –

Q Wait a minute. What rule are you pointing me to?

A I'm not sure of the exact citation. But in 1821 it refers to access to the water, view of the water, able to pull your boat up at that site.

Q Okay. I'm not familiar with that provision. The Rule does require in 3-A that you have before you, it references 253-141 Florida Statute that defines riparian rights; is that correct?

A I'm not – where was that?

[96] Q 253-141, it's in subsection A?

A Yes. That's referenced here.

Q And that defines riparian rights; correct?

A Yes.

Q Okay. Are you familiar with that section?

A I've certainly read it.

Q Did you look at that definition of riparian rights to conclude that those riparian rights are not being unreasonably infringed upon?

A I don't go back to read it each time, no.

Q So what were the rights that you considered not reasonably infringed upon?

A Well, as I mentioned –

Q You said access?

A I can repeat them again.

Q Please?

A View of the water, access to the water, ability to pull your boat up to the water, ability to fish from that site.

Q Did you consider the riparian rights to future accretion?

A In our Statute it says that that is not addressed.

Q Under what Statute that's not addressed?

A 161, I believe it's 191.

[97] Q So that the right to accretion, right to future accretion is eliminated when; why isn't it addressed?

A Because that's what the Statute tells us.

Q Doesn't the Statute say that upon reparation of the ECL, the future right to accretion does no longer exist?

A I'm sorry. Could you repeat that?

Q Doesn't the Statute 161, chapter 161, state that once the erosion control line is recorded in the public records of the County, that the riparian right to future accretion will not longer exist at that point?

A Yes, that's correct.

Q Has the ECL been recorded in the County records?

A Not yet.

Q So that riparian right to feature accretion still exists today; correct?

A The project can not go forward until that is recorded.

Q Does that riparian right to future accretion exist today because the ECL is not recorded?

A Yes.

Q Okay. Did it exist on the application, the date of application by the City and County for this project?

[98] A Yes.

Q So it was a right that existed that the Department did not consider in 18-21004; correct?

A I didn't say we didn't consider it.

Q Did you consider it?

A It's a mute [sic] point by the time – you can't build the project without an erosion control line established and recorded.

Q We're fully aware of that and litigating that in Circuit Court now. But the fact of the matter is, that right still exists, correct, and you did not consider it?

A I didn't say that.

Q All right. Assuming the right exists today, will the project unreasonably infringe upon that right?

A You want me to interpret –

JUDGE JOHNSTON: Well, I think he's already answered the question. I understand [sic] argument. I think it's a matter of legal argument.

MR. SAFRIET: Okay. That's fine. We'll move on, Your Honor.

Q (By Mr. Safriet) Another right, the right to have your property remain in contact with the water. Is that a riparian right that you considered?

A No.

[99] Q No?

A No, I did not.

Q So, if assuming that's a right, a riparian right, would this project unreasonably infringe on a

riparian property owner's right to have their property remain in contact with the water?

A I'll defer that to someone else.

Q Will the property line of the riparian owners, assuming this project goes forward, touch the water?

A No.

Q Okay. So they will lose contact with the water, their property?

A Correct.

Q Now, the Department did not consider that riparian right in its analysis under 18-2104?

A Did not consider it adverse impact.

Q You didn't consider it an adverse impact. You didn't consider that it unreasonably infringed on that right?

A That's correct.

Q Wouldn't it eliminate that right?

A Again, we're in an erosional area. They're losing their property we're trying to maintain a beach in this area. If we don't do something, it's – an erosional area.

[100] Q Well, my question was whether or not it would infringe upon that right, not the purpose and the effect of what the process does.

MR. PLANTE: I'm sorry. Can we have a citation to that riparian right? I mean, the right to maintain your property's access, I mean, touching it so that there's a reference, he's asking questions as to 161. I'm sure Mr. Seeling doesn't have it memorized.

MR. SAFRIET: Yes. The citation would be 512 So.2d 934. It's the Board of Trustees of the Internal Improvement Trust Fund versus Sand Key Associates Limited, Supreme Court of Florida, 1987.

MR. PLANTE: Thank you.

MR. SAFRIET: Page 936.

JUDGE JOHNSTON: What was the, 936?

MR. SAFRIET: Yeah. Page 936. It's 934 -- or 512 So.2d 934, page 936.

Q (By Mr. Safriet) All right. Mr. Seeling, moving along to Chapter 62-B-41005. Are you familiar with that section?

A I'm familiar with the chapter focus in on 005.

Q To apply for a permit under 62-B-41005, don't you have to be a riparian owner to apply for a permit to do construction on that property?

[101] A You're referring to the application procedures for a Coastal Construction permit. That no longer exists.

JUDGE JOHNSTON: What rule did you just cite?

MR. SAFRIET: 62-B-41005.

JUDGE JOHNSTON: Well, is that 41-.005.

MR. SAFRIET: Yes, Your Honor.

THE WITNESS: That's the procedures for a permit that no longer exists. That program has been combined to become a joint coastal permit and the processing procedures for a joint coast permit are in 62-B.49.

Q (By Mr. Safriet) Okay. Has 62-B-41 – 62-B-41 been repealed or does the DEP just not use them?

A I am hired to implement the joint coastal permit program. There is no coastal construction permit any longer.

Q Okay. Well, let's take a look at 62-B-41.005 in the event it that has not been repealed because that's regulations that would have to be complied with; correct?

A 62-B-49 refers to who is eligible to be an applicant for a joint coastal permit. And includes municipalities and counties.

Q Is the City of Destin and the County of Walton applying for construction permit, a coastal construction [102] permit?

A No, they're not.

Q What are they applying for?

A A joint coastal permit.

Q What does that permit authorize; does it authorize coastal construction?

A It uses the criteria in the coastal construction criteria for issuance, yes.

Q Let me show you 62-B-49.005. Let me look at it and mark what I'm going to read. I've highlighted subsection 2 there. If you could read that for me and that's under the joint coastal permit section that you said applies.

A The applicant shall provide specific information required by this chapter in section 161-041 Florida Statues, part 4 of the Florida Chapter, 373, Florida Statues. And Chapters 1818, 1820, 1821 and the Florida Administrative Code, if applicable. As well as Chapter 62-B-41, 62-343, 62-4, 62-312 of the Florida Administrative Code.

Q Doesn't that section say for a joint coastal permit that the requirements and submittal requirements under 62-41, 62-B-41 are critical?

A Yes, it does.

Q Okay. So that provision would incorporate all [103] of 62-B-41; correct?

A It says if we have – it requests the information listed there.

Q Okay. So 62-B-41 has not been repealed and is applicable; correct?

A The information is not pertinent to a joint coastal permit, so it was waived.

Q Okay. So you're telling me that you waived the provision in 62-B-41005 that requires a riparian owner – that requires that a permit can only be issued to a riparian owner?

A Because it's a joint coastal permit and a joint coastal permit says an applicant may be a county, municipality, et cetera.

Q And where in that joint coastal program does it state that?

A I'm not sure the citation. It's probably in the definition section.

Q An applicant as defined in 49-002 is defined as any person, firm, corporation, county, municipality, township, special district, so it's not limited to a County or City; correct?

A That's correct.

Q It can be a person?

A That's what I thought you were asking. It [104] doesn't have to be the property owner. It can be a government entity.

Q Right. But that applicant has to have sufficient interests in the riparian property; correct?

A No.

Q Can I apply for a joint coastal construction permit on somebody else's property?

A You're not a government entity.

Q Can a government entity?

A Yes.

Q Under what provision? Where is the legal authority for that?

A I would say in 1821.

Q The provision we just read about interference of riparian rights?

A That's correct.

Q That's the only legal –

A Sufficient upland interests, that section. And it says it's not required for a government entity doing restoration.

Q Provided riparian rights are not unreasonably interfered with; correct?

A And that was our determination.

Q Okay. And is there any other legal authority you have for saying that the city can apply for this [105] permit without having those riparian and or any kind of interests in the riparian home, aside from that one provision?

A That seems to be sufficient.

Q Okay.

JUDGE JOHNSTON: No further questions.

REDIRECT EXAMINATION

BY MR. MILLER:

Q Mr. Seeling, opposing counsel mentioned the right to have property always touch the water. Now, isn't it true that most riparian owners deeds state that they own down to the mean high water line?

A Correct.

Q Okay. So if they own down to the mean high water line, would their property touch the water during the low tide phase?

A No, it would not.

Q So, it doesn't always touch the water?

A That's correct.

Q Isn't that language more associated with maybe like a fresh water lake or river, where the water levels are always the same?

A Usually in a fresh water system it refers to it as ordinary high water. But, yes, that's correct.

Q Speaking of accretion, is the beach accreting [106] right now or is it eroding?

A It's significantly eroding.

MR. SAFRIET: Objection, Your Honor. That's irrelevant.

JUDGE JOHNSTON: Overruled.

Q (By Mr. Miller) So, if the beach is critically eroded and the Department and the sponsor are in the process of rebuilding the beach, wouldn't accretion be total speculation?

A [sic]

MR. SAFRIET: Objection, again, Your Honor. It goes beyond direct or cross. I didn't inquire as to whether that right was considered. If it's a right, it's a right. I didn't inquire as to whether it was going to happen or not. That's irrelevant for the purposes of the Department's review.

MR. MILLER: And what I'm trying to get across, Your Honor, is that right is just speculative in nature.

JUDGE JOHNSTON: Which right are we talking about?

MR. MILLER: The right to accretion.

MR. SAFRIET: The right to future accretion. It either exists or it doesn't exist. It's not dependent upon whether accretion will exist or will [107] not exist. It's a vested right as stated in the Sand Key case.

JUDGE JOHNSTON: I'll overrule the objection.

Q (By Mr. Miller) so, if the beach is eroded and they're dealing with a project, let me strike that.

MR. MILLER: I believe that will cover it, Your Honor. Thank you.

MR. PLANTE: I don't have any questions, Your Honor.

JUDGE JOHNSTON: Anything else?

MR. SAFRIET: Nothing, Your Honor.

JUDGE JOHNSTON: Thank you. You may be excused. Oh, at this point I'm inquiring, this is a joint exhibit listed, the Department application file, which I have not seen yet and I'm curious as to whether I'm going to get it at some point.

MR. PLANTE: The next witness.

JUDGE JOHNSTON: Okay. Also, off the record.

(Short lunch recess taken at this time)

(Back on the record)

JUDGE JOHNSTON: All right. We're back on the record. And we're back to the applicants now?

MR. PLANTE: Yes, sir. Walton County and the City of Destin would like to call Jamie Christoff.

THEREUPON:

[108] JAMIE CHRISTOFF,

having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. PLANTE:

Q Good afternoon. Would you please state your name and business address?

A I'm Jamie Christoff. 5050 West Tennessee Street, Tallahassee, Florida.

Q And where are you currently employed?

A Currently Department of Environmental Protection.

Q And what is your current position with the Department?

A I am an Environmental Resource permit processor.

Q And how long have you had this position?

A Two and a half, almost 3 years.

Q Would you please summarize your educational background since graduating from high school?

A I received an AA degree in Pre-biology, Gulf Coast Community College. And then went on to

Florida State University where I received my Marine Biology B.S. degree. Took a long break and then went back to graduate [109] school and got my Chemical Oceanography degree at FSU.

Q And will you please summarize your employment background?

A Well, started out at the Hawaiian Sea and Marine Biology where I was taking and analyzing fish catch samples for fisherman in Honolulu Bay. And then I worked at a USDA lab in Hawaii. And then came back to the mainland and worked with Florida Department of Environmental Protection in the recycling section. And then took a break. I was a graduate research assistant while I was at Florida State University when I was at Graduate School. Then I worked in the groundwater protection section at the Florida Department of Environmental Protection. Then transferred to the job that I have now.

Q Would you please describe your duties in your current position?

A Like I said, I'm a permit processor. I work under Marty Seeling. And I process permit applications, joint coastal permit applications, water resource permit applications and environmental resource permit applications. And in northwest Florida in northeast Florida.

Q Would you please explain to the Court the process for reviewing an application for a beach [110] renourishment project once it hits your desk?

A Once it hits my desk, I will take copies of the application and distribute them to various agencies, including Florida Wildlife Conservation Commission, the State Historical Preservation office, Department of Community Affairs. And, as well, as engineers in our Department. And anybody else that would have an interest in the particular application. And we have to review that application within 30 days, Statutorily. And within that 30 days, we deem it completed or incomplete. If it's incomplete, we have to send out a request for additional information, an REI [sic]. And, therefore, then it's in the applicant's hands. And then we deal with that process many times, depending on how long it takes them to get the information that we need to deem the application complete.

Q Are you familiar with the beach restoration project that's the subject of this hearing?

A Yes.

Q And when did you first become aware of it?

A When it hit my desk in July of '03. And there was a preapplication meeting, I think, prior to that that I was somewhat involved with. But I hadn't been in the Department very long and was talking about it.

Q Are you the principle reviewing individual for [111] this project?

A Yes.

Q Did you bring a copy of the application with you?

A Yes, I did.

Q Have you reviewed what's in that box?

A Yes.

Q And is that a true copy of it?

A Yes.

Q When you're reviewing it, is there anything missing?

A Yes. We had different version of the draft permit, which is right here.

Q Okay. Is that included now in the permit file?

A Yes.

Q And would that make the permit file complete?

A Yes.

MR. PLANTE: Your Honor, I'd like to move what we'll title the joint exhibit, exhibit number 4 into evidence as the permit file for this case. This isn't the supplemental one, which was missing out of the initial box.

JUDGE JOHNSTON: This is not a joint exhibit?

MR. SAFRIET: Yes, it is a joint exhibit.

MR. PLANTE: A joint exhibit.

[112] MR. SAFRIET: I haven't reviewed that very exhibit, but I've reviewed the DEP file, not the County or City file.

MR. PLANTE: Correct.

KELLY PLANTE: It's just the DEP file.

JUDGE JOHNSTON: Then we'll call it joint exhibit number 1 and it's received.

Q (By Mr. Plante) The request for additional information, the REI's [sic], are you responsible for those solely or is there input from others?

A There is others. Again, once the applicant responds to our request for additional information. I then distribute it to people that would need to provide input comments. And then, again, we have 30 days to review that response. So, to answer your question, there are other people that provide input about comments to the REI [sic] responses.

Q And were – when you sent out the letter?

A Yes.

Q So some of the comments in the request for additional information were not generated by you?

A Correct.

Q The letter is generated by you but the comments may be from another engineer?

A Correct.

[113] Q Was the application deemed to be complete by DEP?

A Yes.

Q Does the Department consider Walton County and the City of Destin to have met the requirements of the term applicant, as defined by Rule 16-B, Florida Administrative Code for purposes of submitting an application for the beach renourishment program?

A Yes –

JUDGE JOHNSTON: Which rule?

MR. PLANTE: 16-B, just chapter 16-B and if you'll give me a minute I'll give you the specific. Florida Administrative Code. And it – aside from Your Honor, Walton County and Destin will be ordering a transcript. So we'll be able to supplement your notes.

Q (By Mr. Plante) As part of the application project – what is the project sponsor, would you define that term, please?

A What is the project sponsor?

Q Right. Is that the same as an applicant?

A Not in all cases. In this case, the applicant – they're co-applicants. And they're going to act as a

sponsor in the sense of monitoring, et cetera. Does that answer your question?

[114] Q Yes.

A Okay.

Q As part of the application project – process, is the applicant in this case Walton County and the City of Destin, required to submit evidence of ownership or interest in all upland properties encompassed by the beach renourishment project as part of the application?

A No.

Q And why is that?

A Simply because, that was addressed earlier, they're a government entity and beach nourishment is considered public interest and they don't need to provide us that information.

Q In the first REI there was an indication that – I just drew a blank – that indication of ownership was required and in the response submitted by Taylor Engineering said that based on a conversation with you that was not required any longer. Was there a change of minds or what transpired between the request and the response?

A Simply because we realized that given that it was a government entity, and as we addressed earlier, they didn't need to provide us that information. And this application was, I believe, the first beach nourishment application we had processed.

[115] Q Once the process is over and this Administrative Hearing is done or whatever, before the project can proceed, is there a – is this the final – this is marked draft, what's issued that would finally authorize the County and the City to proceed?

A I'm sorry, after we issue the Intent to Issue?

Q Right. Is it the Intent to Issue and then this hearing and then, I mean assuming that the hearing, if we will be successful with the hearing, what is issued after that before they could proceed with the project?

A Well, we would eventually issue a final permit.

Q Okay.

A And then there's Notice to provide items within the permit and if they've complied with that information, we could issue a Notice to Proceed. And that gives them the authority to actually proceed with the project.

Q Okay. As part of the authorization under the Rules, is it a requirement that the permit, that prior to it getting issued, the Notice to Proceed, that easements, construction easements, whatever is necessary on the local level will be secured?

A Well, there is a general condition in the permit that says that they may need to get these construction easements, if you will, to get on people's property to do that.

[116] Q So, that is basically a permit condition as opposed to a prerequisite for the application?

A Correct.

Q So if I understand it, even though the Department would issue the permit, if the local, in this case, Walton County and City of Destin do not obtain the proper authorizations, then they can't go on without Notice to Proceed, if they don't clearly demonstrate to you that they can use the upland portion?

A Not necessarily.

Q Pardon me?

A Not necessarily, no. I mean, getting a construction easement to get on someone's property is something that the applicant has to work out with, you know.

Q But you leave that up to the applicant?

A Yes. Yes.

Q Were you involved with the Request for Variance that was applied for?

A Yes.

Q And I think, as I understand the variance was withdrawn, it was never normally acted on by the Department?

A Correct.

Q Now, from your understanding of a variance, [117] would the variance, had it been granted, be more or less restrictive on the project?

A More restrictive.

Q The variance, if it had been granted?

A If the variance had been –

Q Granted?

A Well, in the sense – no, sorry, no, you're right. It would be less restrictive. It would be less restrictive. In the sense that they – let me think about this – they have to have a higher mixing zone so they would have more NTU's. They could have more, you know, turbidity within the mixing zone. So it would give them more room.

MR. PLANTE: I have no further questions, Your Honor. I would like to move that into evidence.

JUDGE JOHNSTON: A joint exhibit.

MR. PLANTE: A joint exhibit.

JUDGE JOHNSTON: It's in evidence. It's received.

MR. MILLER: Nothing from the Department, Your Honor.

CROSS EXAMINATION

BY MR. SAFRIET:

Q Good afternoon, Ms. Christoff.

A Good afternoon.

[118] Q A couple of questions for you. You said you've been working at the Department for two and a half to three years?

A Correct.

Q How many beach renourishment projects have you reviewed during that period of time?

A About four, maybe five.

Q Okay. You stated earlier that the City did not need to provide notice or evidence of sufficient upland interest because they were a governmental entity; correct?

A Correct.

Q In what provision of the Rule were you relying on for that statement?

A The same one that we talked about that was addressed earlier, 1821.

Q 004-3-B.

A Uh-huh.

Q And that's the provision that says provided that such activities do not unreasonably infringe on riparian rights; correct?

A Correct.

Q And in your review of the application, did you consider whether the riparian rights would be infringed?

A Yes.

[119] Q What riparian rights did you consider?

A The ones that are within the Rule that say you won't infringe upon the rights to access the water, fish, boat, view of the water.

Q The same ones that Mr. Seeling –

A Correct.

Q Stated that he reviewed?

A Correct.

Q You did not consider the right to future accretion, did you?

A Well, it's not –

Q Either you did or you didn't?

A It's not something that we, you know, Statutorily we – no.

Q So, no.

A No.

Q Did you consider it a right to have a riparian owner's property touch the water as a riparian owner, did you consider that a riparian right?

A No.

Q Now, you stated in your Notice of Intent, did you draft the Notice of Intent?

A Yes, I did.

Q Okay. I'll show you page 4 of the Notice of Intent and I guess it's within exhibit 1, joint exhibit [120] 1. The highlighted portion that says the Department – says that the City and the County provide reasonable assurance that riparian rights would not be unnecessarily interfered with; is that correct?

A Yes.

Q Is that your conclusion?

A Yes.

Q Okay. If a – if a property owner has a right for their property to remain in contact with the water, the mean high water line, would this project interfere with that right?

A I suppose, yeah.

Q Okay. Would this project, the erosion control line would be the property boundary of the riparian owner's property if it's approved; correct?

A Correct.

Q The mean high water line will be seaward of that line and there will be sand upland of the

property in between the erosion control line and the new mean high water line; correct?

A Could you repeat that?

Q Between the erosion control line and the actual water line, the new mean high water line after restoration, will be upland of sandy area; correct?

A Correct.

[121] Q So the property will no longer touch the mean high water line; correct?

A Correct.

Q All right. Neither will the property owner's, riparian owners' have a right to future accretion after this project; correct?

MR. PLANTE: Objection. Calls for legal conclusion.

JUDGE JOHNSTON: Overruled. You may answer, if you know.

THE WITNESS: Repeat the question.

Q (By Mr. Safriet) After this project, will a riparian property owner have a right to the accreting Ted property on the beach?

A I'm not sure. I don't think so.

Q Are you familiar with chapter 161?

A Yes.

Q 161.191.

A I'm sure I've read it but I don't know the citation off the top of my head.

Q Are you aware that that Statute –

JUDGE JOHNSTON: I overruled the objection based on if she knew the answer. But overwise it's a legal matter.

MR. SAFRIET: I'll move on.

[122] Q (By Mr. Safriet) Is there any other Statute or Rule criteria that authorizes the City and County, solely because they're a governmental entity, to apply for a permit for coastal construction and authorization use sovereign submerged lands, without providing evidence of sufficient upland interests, other than the evidence of sufficient upland interests?

A Are there any Rules?

Q Any other Rules, Statute, any other legal authority that the Department had relied upon, aside from Chapter 18-210043 that we've been discussing?

A No.

Q Did you consider whether or not the applicant provided all necessary information under Chapter 62-B-41?

A Yes.

Q Did they?

A Yes. We felt like we did when we reviewed it.

Q Let me hand you a copy of 62-B-41. Does the City meet the definition of riparian owner in subsection 38 of 62-B-41002?

A By this definition you're asking me if the City would be a riparian owner?

Q Yes, ma'am.

A Yes. They could if they have a public access point.

[123] Q So, they would be are a riparian owner where they have –

A No.

Q No, they would not?

A No.

Q Doesn't 62-B41005 require an applicant to be a property owner or riparian owner before a coastal construction permit is issued under that chapter?

A 62-B-41?

Q Yes, ma'am.

A That's –

Q 005, specifically y subsection 3?

A (003)?

Q (3).

A (3). Well, according to this – can you repeat the question, please?

Q Yes. Does 62-B-41005 require an applicant for coastal construction permit to also be a riparian or a property owner?

A Yeah.

Q Okay.

A According to that.

Q And what evidence has the City or County submitted to the Department to indicate that they are riparian owners or have a sufficient evidence of interest [124] in any of the property along the beach renourishment area?

A Again, they're a government entity and they don't have to supply that information.

Q Well, I understand your testimony but I'm asking what evidence that they submitted that shows that they have an interest in this property. If the answer is none it's none?

A None.

MR. SAFRIET: No further questions, Your Honor.

MR. PLANTE: I have one question.

REDIRECT EXAMINATION

BY MR. PLANTE:

Q Ms. Christoff, is this a joint coastal permit or a coastal construction permit?

A It's a joint coastal permit.

MR. PLANTE: No further questions.

MR. SAFRIET: Your Honor, if I may?

JUDGE JOHNSTON: Yes. Recross on that only.

MR. SAFRIET: I only have that one issue.

RECROSS-EXAMINATION

BY MR. SAFRIET:

Q The 62-B-49, which is the Rules for the joint coastal permit processing, does that incorporate all the regulatory requirements found in 62-B-41?

[125] MR. PLANTE: Your Honor, is this redirect or is this a completely different issue that was overlooked before?

MR. SAFRIET: No. This is redirect. He just asked whether 62-49.

JUDGE JOHNSTON: You mean recross?

MR. SAFRIET: Recross, I'm sorry. Applied.

JUDGE JOHNSTON: Yes. You may proceed.

MR. SAFRIET: Thank you.

THE WITNESS: Repeat the question, please.

Q (By Mr. Safriet) 62-B-49, which applies to coastal, joint coastal permits and 62-B-41, which applies to construction permits, there seems to be some discrepancy whether both of them apply or one applies and the other doesn't apply. In this case, does 62-B-49 and 41 both apply or does 49 trump 41 and it doesn't apply at all?

A Well, 62-B-41, refers to property joint coastal permits. 62-B-41 is coastal construction permits. So, we have to take into consideration when we're processing joint coastal permits because construction Rules and Statues that would be applicable.

Q So you do look at 62-B-41 for the sectional requirements of coastal construction when you're processing a joint coastal permit?

[126] A Yes.

Q Thank you.

MR. SAFRIET: No further questions.

JUDGE JOHNSTON: Thank you. That's all. You may be excused.

(Short recess taken at this time)

(Back on the record)

JUDGE JOHNSTON: Back on the record. You may call your next witness.

MR. PLANTE: Our next witness is Brad Pickle.

THEREUPON:

BRAD PICKLE,

having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. PLANTE:

Q Good afternoon, Mr. Pickle. Will you please state your full name and business address?

A Sure. Bradley Hugh Pickle. 25777 Highway 331 South, Santa Rosa Beach, Florida.

Q And where are you currently employed?

A Walton County Tourism Development Council.

Q And how long have you been employed there?

[127] A I've been there since March of 2000.

Q And what is your current position?

A I'm the Director of Beach Management.

Q And how long have you held this position?

A Roughly two years. I originally started as the Beach Management Coordinator and was promoted to

Director of Beach Management about two, two and a half years ago.

Q Would you please summarize your educational background since graduating from high school?

A Sure. I went on to Auburn University and received my Bachelor's degree in Marine Biology. I've also taken course work in Coastal Management and Coastal Geology and Coastal processes similar to the type of things that we have to do as Beach Managers. Went onto graduate school and got a Master's degree at the University of South Alabama in '95. Working with a coastal engineer doing programs similar to studying erosion, some of those types of things, erosion, accretion like in graduate school.

Q Are you a member of any professional organizations?

A I sure am. A number of them. I'm a treasurer of the American Shore and Beach Preservation Association which is probably a preeminent organization for Beach Managers. Also, on the Board of Directors for Florida [128] Shore and Beach and Coastal Zone Management; Committee of the Coast, Ocean, Ports, Marine Institute. And a variety of other American Geophysical Unions. But many professional organizations.

Q Would you please summarize your current duties and responsibilities in your current position?

A Sure. In regard to this – outside this project, the biggest thing is we maintain the beach, both from

a physical aspect of the actual beach and dune systems itself. And then also, importantly, we maintain beach and bay access locations that get us to the beach. We maintain 55 beach and bay access points of which we have 56 dune walkovers, all of which were impacted by Ivan and I'm glad to report were all up by Memorial Day. But we maintain the beach accesses as well as clean the beach. We have roughly 350 trash receptacles along the beach that are permanent fixtures in the ground on the posts that we go by on a daily basis in the summertime and clear out 7 days a week. In the wintertime, it's mostly driven on usage. But the area in question is one of our high use areas and we get those trash bags about everyday. We also go through and pick up small items that are along the beach, trash, articles. So we really go through and maintain the beaches. In addition to that, we oversee all the dune restoration [129] projects where we actually bring sand into our beaches. We did a huge project, spent roughly 1.9 million dollars after Hurricane Ivan rebuilding our dune systems throughout the County. We've have done that now a couple of times. It was also done before we got – after Hurricane Opal. We also planned to install up to 900,000 sea oats, which are the native vegetation to help support our dune systems because we have a very thriving program here. One thing I've noticed, proactive Beach Management Program. One item of note is that it may seem like small projects but these run up into the millions of dollars, on a smaller scale that we're able to fund through tourist development taxes. So

we do a variety of things here. And I'm responsible for and maintain those beach areas.

Q What was your role or what is or was and currently your role with respect to the beach renourishment permit?

A Sure. The Walton County TDC is a County Agency. We're just like a Public Works Department. We just happen to be the ones that oversee the beach area. My role in that is the project manager, per se, for all beach and dune restoration projects, this being one of them.

Q Okay. Does the – does Walton county own any [130] upland or riparian property within the reaches of your portion of this project?

A Yes, sir.

Q Can you please show the Court with the maps, aerials that you did, where they're located?

A Sure. I'll be happy to. The first one runs from and then – this is the beach access. You can roughly see the divider line is one side of the ownership over to this line. That's a beach access. We have roughly 5 walkovers. This is all Walton County property. That's called the Miramar Beach regional access. It's one of those 55 that I had mentioned. Just to give you an idea, this is located in that western section, this area. And as you can see – this is to kind of let you know what this is, this is information that was provided with our permit to the erosion control line, which is one piece of the permitting project. So we did submit

information showing Walton County ownership as part of the permit application. And this was submitted. So this was one of our access points and we have three more.

Q Okay. That's fine.

A Or four more, really. We have a few more in there. But we do have upland interests.

Q When you were mentioning earlier the trash pick up and all, are the beaches within the area encompassed [131] by this project open to the public?

A Yes.

MR. SAFRIET: Objection, Your Honor. That calls for a legal conclusion.

BY JUDGE JOHNSTON:

JUDGE JOHNSTON: Would you repeat the question?

Q (By Mr. Plante) Are the beaches within this area open to the public?

JUDGE JOHNSTON: Within what area?

MR. PLANTE: Within the area of the project.

JUDGE JOHNSTON: Okay.

MR. SAFRIET: And I would object to how far from the mean high water line seaward, yes, Your Honor. But what part of that uplands is public is a

determination the Circuit Court has to make. That's private land by law until there's a Document of Customary Use easement being granted somewhere. So it's not open to the public is a vague question and calls for a legal conclusion and subject to other Circuit Court action.

JUDGE JOHNSTON: Did you want to –

MR. PLANTE: I'll probably rephrase the question.

Q (By Mr. Plante) From your experience in your current position, does the public use these beaches?

[132] A Yes. They sure do.

Q And how long – the trash bags and receptacles that you mentioned earlier, are they on the wet sand area or are they on the uplands dry sand area?

A They're on the dry sand area.

Q And how long has Walton County been basically collecting garbage off the beaches during this – in the area encompassed by the project?

A Sure. It's actually two parts. The Tourism Development Council has been doing it since 1990. Prior to the Tourist Development Council taking that over, the actual Public Works Department had been the Agency and through the road crew has been responsible for all the years before that. So there's many years. I couldn't even tell how far back it goes.

But we've been responsible since at least 1990 and then the public road crew took it over before that.

MR. PLANTE: That's all that I have, Your Honor. Thank you, Mr. Pickle.

MR. MILLER: Nothing from the Department, Your Honor.

CROSS EXAMINATION

BY MR. SAFRIET:

Q Good afternoon, Mr. Pickle.

A Good afternoon.

[133] Q You stated that Walton County had ownership of upland along this property?

A Yes.

Q How many parcels does it own.

A There's four property locations in this section of west Walton County.

Q Western Walton County. How many miles of the land is in Walton County subject to this beach restoration project?

A 4.8 miles.

Q 4.8 miles. How many parcels of property within that 4.8 miles?

A Roughly 275 of it vary based upon whether it's a condo, whether it's a townhome or single family residences.

Q Okay. Of those 275 parcels, Walton County owns 4?

A Yes. But the length of shoreline is really, I think, the big issue.

Q Well, I just asked for ownership right now.

A Sure.

Q With respect to the other 271 parcels, does Walton County have any ownership interests in those parcels?

A No, we do not.

[134] Q Did Walton County submit any evidence of ownership interests in those other 271 parcels?

A No, sir.

Q Is Walton County in the process of obtaining some type of evidence of upland interest in those properties?

A We will be pursuing construction easements prior to the initiation of the project.

Q But you don't have those construction easements today, do you?

A They have not been sent out, no, sir.

Q Okay. With respect to the other 271 parcels, Walton County does not have a deed, an easement or any other form, lease or any other legal form of ownership or interests in those properties, do they?

A Not today.

Q Now, Walton County has applied in this permit, has it not, for beach restoration activity on those other 271 parcels?

A It sure has.

Q So it's not limited to the four parcels that Walton County owns; correct?

A No. That is correct.

MR. SAFRIET: No further questions, Your Honor.

MR. PLANTE: No further questions, Your Honor.

[135] MR. MILLER: None from the Department.

JUDGE JOHNSTON: Just for clarification. Where the trash receptacles are, are those all along the 4.8 miles or is that only in front of these areas that the County accesses are?

THE WITNESS: Actually, those are along – and the Walton County shoreline is made up of 26 miles. So, those 350 trash bags are spread throughout all 20 miles. So, yes, it is definitely outside of County

owned properties in Destin and Walton County, yes, sir. And it's along the base of the dunes so they don't get washed away by the storms to kind of give you a location of where they fall. So, it would be the upland part of the dry beach.

JUDGE JOHNSTON: Well, specifically related to this case, as I understood your testimony, there's 4.8 miles of Walton County or beach within Walton County that's subject to this?

THE WITNESS: Yes, sir.

JUDGE JOHNSTON: And the receptacles that are along those 4.8 miles are not only within the four access areas, but also outside those four access areas?

THE WITNESS: Yes, sir. That is correct.

JUDGE JOHNSTON: Thanks.

[136] MR. PLANTE: The City of Destin and Walton County would like to call Wendy Chabot.

THEREUPON:

WENDY CHABOT,

having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. PLANTE:

Q Good afternoon, Ms. Chabot. Would you please state your name and business address?

A Wendy Chabot. 4200 Two Trees Road, Destin, Florida.

Q Okay. And where are you currently employed?

A I'm employed with the City of Destin.

Q And how long have you been employed with the City of Destin?

A This August I will have 10 years at the City.

Q What is your current position?

A I am the grants and project manager.

Q And I take it you're familiar with this project?

A Yes.

Q What has been your job or role with respect to [137] this project?

A Actually, this project began 10 years ago when I first started with the City and we experienced Hurricane Opal. And it was at that time that I first become involved with recovery and trying to get our beaches back. And that's when we had really lost a beautiful beach, at that point. And so from that point

on, I've been involved with all of the steps that it's taken to get us to this point. And it began with just renourishment activity, activities. And then through the State we were given the opportunity for grant funding to add sea oats and do a feasibility study. And we had a chance to join with Walton County to do a much – a regional beach renourishment, which was a huge exciting prospect to be able to really restore a large area of beach. Because the larger the area of the beach that's restored, the more stable it is.

So, we've been on this track since 1995, actually, to reach the point where after all the public meetings and different – looking at different options of what we could do to best manage our beaches, the restoration project in the eastern most part of the Okaloosa County and the western most part of Walton County, it was determined that that would be the most advantageous area to restore.

[138] Q Does the City of Destin own any property within the area of Okaloosa County?

A Yes. We own about, within the project area, about six beach walkover access ways and one beach parcel.

Q Is the beach area, and I'm sure you heard my question to Brad – does the public have an access to all of the beach that is encompassed in the City of Destin portion of the property?

A Yes.

MR. MILLER: Objection, Your Honor. Calls for speculation.

THE WITNESS: Historically, it –

JUDGE JOHNSTON: Same ruling as before. So overruled.

Q (By Mr. Plante) So it's open to the public?

A Yes.

Q What activities are performed by the City of Destin on the beaches?

A The City of Destin itself, we have, at our beach access points, we have trash pickup and our Public Works Department does that. But we're a partner in the Okaloosa County Tourist Development Council. Since we're just a municipality we're part of that TCD. And they do the beach cleaning and the beach sweeping. We also have [139] a partnership with the Destin Fire District that does the safety. We have safety patrols during the season.

Q You mentioned the beach clean up, is that picking up trash?

A Picking up trash at the end of the days and, I think sweeping the beaches.

Q What is sweeping the beaches?

A Just cleaning.

Q I'm sorry, is that with a machine?

A Yes. It's a machine.

Q And is that done all on the wet sand area or on the dry sand uplands, also?

A No. Basically on the sandy beach area. The wet sand area.

Q And do you know how long the Okaloosa County, the TDC, has been doing this?

A The TDC has only been in existence since 1990. But I believe, like Walton County, our County Public Works previously took care of the beaches.

MR. PLANTE: Thank you. I have no further questions, Your Honor.

MR. MILLER: Nothing from the Department.

CROSS EXAMINATION

BY MR. SAFRIET:

Q Good afternoon, Ms. Chabot. Is it Chabot?

[140] A Yes.

Q Okay. You just testified of these beach cleaning efforts. Have some property owners excluded themselves from that?

A I believe that some property owners have written to the TDC. Well, they've written to the City of Destin. We've transferred that to the TDC.

Q Have several property owners indicated their intent for the City to stay off of the dry sand area portions of their property?

A Several have, yes.

Q Has the City recently scrapped [sic] on that private property?

A Yes, they have.

Q Without the permission of the private property owners?

A Yes.

JUDGE JOHNSTON: Scrapped [sic]?

MR. SAFRIET: Yes.

Q (By Mr. Safriet) Can you explain what the City did?

A Following Hurricane Ivan –

MR. PLANTE: Your Honor, that may be very informative, but I don't know why the beach scraping has anything to do with this case.

[141] MR. SAFRIET: The same thing trash receptacles has got to do with the case, Your Honor.

MR. PLANTE: Beach scraping is the subject of an entirely different suit in another forum.

JUDGE JOHNSTON: I think, the question, at least, has been raised about some kind of public easement to beach –

MR. PLANTE: I'll withdraw that objection.

MR. SAFRIET: Thank you, Your Honor.

Q (By Mr. Safriet) Please explain the beach scrapping [sic], what the City did?

A Following Hurricane Ivan, we lost all of the dunes and some protective dunes. And because our sand, in this area is so unique and so difficult to find, we could not find upland sources to bring new sand in to build emergency berms, which FEMA, after they looked at our beaches, said we needed to put in some emergency structures to protect against a five years level storm. Because we could not find upland sand or any sand that was comparable, and that is one of the things that our upland property owners insist on that we maintain the beauty of the white sand of our beaches –

Q Ms. Chabot, let me stop you there. You said your upland property owners insist upon, isn't it true that not all upland property owners insist upon the [142] City's maintenance of the beach?

A It's true that it's definitely a controversy.

Q Isn't it true, also, that the property owners think what the City is doing to the beach is detrimental?

A Very few of them do.

Q Okay. But isn't it true some do?

A Some do.

Q Absolutely. You stated earlier that the City owns one parcel of property within a how many mile stretch is it, the City of Destin, 2 –

A The actual – all of Destin is about six miles of beachfront. This project area is two miles.

Q Okay. So it's a 2-mile stretch of beach subject to the beach renourishment of this project?

A Yes.

Q How many property owners are in that 2-mile stretch?

A I believe there's 178 properties.

Q One hundred seventy-eight properties. How many does the City own?

A One parcel and six accesses. And also included is Okaloosa County's James Lee Park.

Q Okay. So, is Okaloosa County an applicant to this permit?

A No. It is a partner with the project, however.

[143] Q But it's not an applicant?

A Correct.

JUDGE JOHNSTON: It is a what?

THE WITNESS: It's a partner in the project there. They are assisting the City.

Q (By Mr. Safriet) The beach renourishment project at issue proposes to renourish the beach on the 177 properties?

A Correct.

Q That the City does not own; correct?

A Correct.

Q Does the City have any ownership interest in those 177 parcels?

A No.

Q Has the City submitted any evidence of interest in those properties to DEP?

A No.

Q I'm not sure if I asked this question earlier. I apologize if I did. With respect to the City's scraping of the beach, that occurred on private property; did it not?

A No. It was actually below the mean high water line. Now, the sand that was carried actually did go above the mean high water line. But the scraping took place in the – below the mean high water.

[144] Q Okay. But that sand was pushed onto private property; correct?

A Yes. It was pushed to the upland property.

Q Without the permission of certain private property owners; correct?

A Correct.

MR. SAFRIET: No further questions.

REDIRECT EXAMINATION

BY MR. PLANTE:

Q Ms. Chabot, referring to the scraping project, was that performed by the City of Destin on its on [sic] initiative or did it have a permit?

A We received a permit from the DEP.

Q And what kind of permit was it?

A It was an emergency permit as a result of emergency measures required after Hurricane Ivan.

Q Okay.

MR. PLANTE: No further questions. Thank you.

JUDGE JOHNSTON: I just have one question for clarification. I believe when you testified you were asked, I believe on direct, about where the cleaning of the beach – cleanup of the beach takes place. And I think that was the point at which you were asked whether that takes place on wet sand or the dry sand area of the beach. And you answered [145] the wet sand area. And my question is: what – when you say the wet sand area, what are you

referring to – first of all, was that your answer; do you recall?

THE WITNESS: I would say it will probably be below the high tide line is where the scrapping [sic], I mean, the sweeping and cleaning takes place from where people have been that day on the beach.

JUDGE JOHNSTON: Okay. Thank you.

MR. SAFRIET: Your Honor, can I just have one question to your follow up?

JUDGE JOHNSTON: Yes.

RECROSS-EXAMINATION

BY MR. SAFRIET:

Q You stated that the scraping took place in the wet sand area; correct?

JUDGE JOHNSTON: I wasn't – my question did not relate to scrapping [sic]. I was talking about cleaning up.

MR. SAFRIET: I'm sorry.

JUDGE JOHNSTON: Sweeping, cleaning the beaches.

MR. SAFRIET: I apologize. I thought you were related to the scrapping [sic].

MR. PLANTE: Your Honor, Walton County, City of [146] Destin and City of Florida rests their case at this time.

JUDGE JOHNSTON: Let me ask this, in this box somewhere is there evidence of where the erosion control line is in relationship to where the beach nourishment project permit is authorizing nourishment to take place? That's something that is still not, at this point, not clear in my mind. And I want to make sure that somebody either answers the question or it's in evidence that I can find the answer to it.

MR. PLANTE: We can bring somebody back up to explain the control line. It's part of the whole process but it was originally challenged in this proceeding. There was another case filed and it was consolidated and then when the amended complaint came up, the ECL was no longer. As part of the permitting process, it's going to have to be set before any of this project can go.

JUDGE JOHNSTON: So, it had not been set?

MR. PLANTE: It had been surveyed and a resolution has been issued by the Board of Trustees with respect to both areas. This is where the ECL is. And when it's set, it hasn't been filed with the clerk of the Court.

[147] JUDGE JOHNSTON: But it's been set it just hasn't been recorded yet; correct?

MR. PLANTE: Right.

JUDGE JOHNSTON: Okay. What I'm trying to understand is whether this nourishment is going to take place entirely seaward of the erosion control line?

MR. PLANTE: No, sir, it isn't. You set the erosion control line which, and I don't mean to be testifying.

JUDGE JOHNSTON: This is what need. I think I need to understand that.

MR. SAFRIET: Your Honor, I think our witnesses will do that. When we demonstrate – we're going to admit the maps, the surveys that actually demonstrate where these lines are.

JUDGE JOHNSTON: Well, why don't we proceed with the case and then if I'm not satisfied we'll get somebody back up.

MR. SAFRIET: The petitioner calls Slade Lindsey.

THEREUPON:

SLADE LINDSEY,

having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as

[148] follows:

DIRECT EXAMINATION

BY MR. SAFRIET:

Q Good afternoon, Mr. Lindsey. Can you state your name and address for the record?

A William Slade Lindsey. 247 Sand Trap, Destin, Florida.

Q Mr. Lindsey, do you own property in Walton County that's subject to this beach renourishment project?

A I do.

Q Is that property ocean front property?

A Yes.

Q Or what property is that?

A Ocean front property on the other parcels.

Q And that property that you own extends to the mean high water line?

A Yes, it does.

Q And that's – a deed or a plat recorded in the records?

A Yes, it is.

Q (By Judge Johnston)

JUDGE JOHNSTON: Just, is that not your address, though? Is it another piece of property?

[149] I'm just curious, is Destin in Walton County?

THE WITNESS: Yes, sir. Well, I'm sorry, our mailing address there is Destin. We're in Miramar Beach.

Q (By Mr. Safriet) so the physical location –

A Walton County, Sand Trap Road.

Q But your mailing address is Destin?

A Yeah.

Q But the property, actually, is in Walton County?

A Yes, sir.

Q Mr. Lindsey, are you testifying here today on behalf or as a representative of Stop the Beach Renourishment, a petitioner in this case?

A Yes, I am.

Q Are you a member of Stop the Beach Renourishment?

A Yes, I am.

Q Can you briefly explain to the court what Stop the Beach Renourishment is?

A It is a non-profit organization that was founded at the onset of this project to first protect the Constitutional Rights that we had when we acquired property. To look at the environmental issues that are

before us and to stop what we think is bad action on [150] behalf of the State. And two or three other things that we drafted in our articles of organization.

Q Okay. Thank you. Let me hand you a document and you can explain to me what that document is?

A These are our articles of incorporation.

Q For Stop the Beach Renourishment?

A Yes.

Q And in those articles, does it set forth the purpose –

A Yes.

Q Of the organization? Can you tell me what that is?

A The purpose is to defend the natural resources of Walton County beaches from unauthorizing, inappropriate beach restoration activities. To protect the private rights set forth in the Constitution of the United States. To seek redress for past, present and future unauthorized or inappropriate restoration activities and public uses, and or around Walton County beaches.

Q Is this document a true and accurate copy of the Article of Incorporation filed with the Secretary of State?

A Yes, it is.

MR. SAFRIET: Your Honor, I move introduction [151] of Articles of petitioner's exhibit 2.

MR. PLANTE: No objection, Your Honor.

JUDGE JOHNSTON: It's received.

Q (By Mr. Safriet) Mr. Lindsey, who are the members of Stop the Beach Renourishment?

A The president is Tammy Alford. The secretary, Janet Frost and other members in our neighborhood.

Q How many members of Stop the Beach Renourishment are there?

A Half a dozen.

Q That will be six?

A Yes, sir.

Q Have these members executed affidavits regarding their substantial interest in the case?

A Yes, they have.

Q They have. I'll get to those in a second. How are the members of, the six members of Stop the Beach Renourishment substantially affected by the County's proposed joint coastal permit and beach renourishment project?

MR. PLANTE: Objection, Your Honor. Hearsay.

MR. SAFRIET: He's testifying as a representative of the members, Your Honor.

JUDGE JOHNSTON: I'll overrule the objection.

A (By the witness) Well, we'll be adversely [152] affected by this project in two or three ways. One, would be our riparian rights with respect to the turbidity of the water. We currently use the beach and immediate areas for swimming and snorkeling, boat activities and just regular enjoyment. We also have, currently have the rights to accretion and to – and the reason we bought the property was so our property would touch the water's edge. And there are other issues, also.

Q Where are those riparian rights to have your property remain in contact with the water, as well as the right to future accretion be affected by the proposed beach renourishment project?

A They'd go away.

Q And those rights, riparian rights of – do all members of Stop the Beach Renourishment possess those riparian rights?

A Yes, they do.

Q All six members that you identified are waterfronts owners who own to the property line, mean high water line?

A Yes.

Q Let me show you some affidavits. You had indicated earlier there were six members of Stop the Beach Renourishment; correct?

[153] A Correct.

Q Did Stop the Beach Renourishment obtain affidavits from its members stating a substantial interest?

A Yes, they did.

Q Are the four affidavits that you have true and accurate copies of those affidavits?

A Yes, they are.

Q And those affidavits, for the record, are from Linyl Alford, Tammy Alford, Janet Frost and Mark Sallenger; correct?

A Correct.

Q And those are five of the members?

A Yeah. If you count me. I didn't fill one out because I was going to be here.

Q But you're testifying here that there is substantial interest, just as theirs were substantial affected by Stop the Beach Renourishment?

A Yes.

Q Okay. Thank you. I'll move that as petitioner's exhibit 3, a composite?

MR. PLANTE: Excuse me, objection, Your Honor. Hearsay. The affidavit in and of itself is hearsay.

JUDGE JOHNSTON: It is hearsay but it's not inadmissible and my use is limited. There has been [154] direct testimony on the same subject.

MR. SAFRIET: Thank you.

JUDGE JOHNSTON: I'll receive these.

MR. PLANTE: As clarification, are they being admitted as hearsay?

JUDGE JOHNSTON: Yes. They're being admitted and recognizing that they are hearsay.

MR. PLANTE: Thank you, sir.

MR. SAFRIET: And that's petitioner's exhibit 3.

Q (By Mr. Safriet) Would the members of Stop the Beach Renourishment be injured if the County and the City failed to comply with the turbidity standards?

MR. PLANTE: Objection. Calls for hearsay.

JUDGE JOHNSTON: Repeat your question, please.

Q (By Mr. Safriet) will the members of Stop the Beach Renourishment be injured if the project exceeds the turbidity standards?

JUDGE JOHNSTON: And –

MR. PLANTE: I believe he can answer as to himself as hearsay. As to everybody else, that's a member –

JUDGE JOHNSTON: I'll overrule. You may answer.

THE WITNESS: I think so, yes.

[155] Q (By Mr. Safriet) will the members of STB, Stop the Beach Renourishment be injured as a result of the projects interference with the member's riparian rights?

A Yes.

Q Is the subject matter of beach renourishment permit and the joint coast [sic] permit within the Stop the Beach Renourishment's general scope of activity and interest?

A It is.

Q Has Stop the Beach Renourishment initiated other litigation against the City and County regarding its riparian rights and issues surrounding beach renourishment?

A Constitutional issues we have.

Q What relief does Stop the Beach Renourishment seek on behalf of its members?

A I'm not sure how to answer that. We're against the project. We prefer the ECL not be

established. It interferes specifically with our riparian rights.

Q In this project you want the Alf [sic] to deny the application; correct?

A That would be wonderful, I think.

Q All right.

MR. SAFRIET: No further questions, Your Honor. Your Honor, I have a few more questions I forgot. [156] with respect as to the ECL line, if that's all right.

JUDGE JOHNSTON: Yes. Go ahead.

MR. SAFRIET: I'm sorry. I apologize. I told you we were going to do it and we didn't.

Q (By Mr. Safriet) All right. Mr. Lindsey, if you can point on this exhibit, which we'll number petitioner's exhibit 3 or 4, first of all, if you can explain to me, Mr. Lindsey, what petitioner's exhibit 4 is?

A This is a map of the Walton County section with the proposed ECL line. And I was looking at my yard so I can show you specifically what the difference was.

Q And is that the map that's in the file, the DEP file?

A Yes, it is.

Q That was submitted by applicant?

A Yes, it is.

Q And that shows the proposed erosion control line; is that correct?

A Yes, it does.

Q Does it also show the extent of construction?

A Yes, it does.

Q As well as where the proposed water line will be after construction?

[157] A Correct.

Q All right. Can you demonstrate for me on that document with these two colored markers and for the Judge?

JUDGE JOHNSTON: Well, let me ask this: Is this already in evidence as part the application?

MR. PLANTE: It is not part of the application.

MR. SAFRIET: All right. It's exhibit 6 on my exhibits.

KELLY PLANTE: It's part of the exhibits but it's not part of the application. It's a separate process. So it wouldn't be in the application file, per se.

JUDGE JOHNSTON: So it's not in this box?

KELLY PLANTE: Correct.

JUDGE JOHNSTON: You may proceed.

A (By the witness) You have a mean high tide line, high water line right here.

Q (By Mr. Safriet) If you can, go ahead and highlight the mean high water line on the survey. For the record, the witness is highlighting the mean high water line in orange.

Now, can you highlight for me the mean high water line after construction as noted on that survey in yellow?

[158] A This –

JUDGE JOHNSTON: Well, does it really need to be highlighted?

THE WITNESS: Well, there's four lines here.

JUDGE JOHNSTON: Go ahead. If you've got enough different colored pens.

THE WITNESS: You want the new high water line?

MR. SAFRIET: Yes. As indicated on the survey.

JUDGE JOHNSTON: Okay.

Q (By Mr. Safriet) So, as noted on the exhibit, but the yellow line is now indicative of the post construction mean high water line; correct?

A Correct.

Q After they placed the sand, the water should be where the yellow line is; correct?

A Correct.

Q Right now the water line is where the orange line is; correct?

A Correct.

Q Okay. Next I want you to highlight the upper limits of construction, to be determined color.

MR. MILLER: What is this now you're doing?

MR. SAFRIET: The pink line he's going to highlight.

THE WITNESS: Where your sand dunes are going. [159]

MR. SAFRIET: The upper limits of construction as noted on the exhibit; correct?

A (By the witness) This is where the berms will – sand dunes will come back into the existing dune structure.

Q And in purple, if you could note, the seaward limits of construction of proposed sand?

A Okay.

Q Thank you, Mr. Lindsey.

JUDGE JOHNSTON: Well, for clarification, I see that. My question, though, is when you say limits of construction, are you saying that that's where sand is going to be added to the beach?

THE WITNESS: It's my understanding that they were going to come back into this pink line, tuck your new sand dunes back into here. And then you're going to put new sand all the way to here.

MR. SAFRIET: The purple line.

THE WITNESS: The purple line. So your construction zone will be from here, all the way to here.

JUDGE JOHNSTON: Construction meaning placed [sic] where sand will be added?

THE WITNESS: Correct.

JUDGE JOHNSTON Okay.

[160] THE WITNESS: And your property boundary will be fixed here at the ECL and this will be –

MR. SAFRIET: Which is the orange line.

THE WITNESS: And this is where the new water line is.

MR. SAFRIET: That's the yellow line, for the record.

JUDGE JOHNSTON: I understand.

Q (By Mr. Safriet) Mr. Lindsey, this exhibit A or petitioner's exhibit 3, it consists of –

JUDGE JOHNSTON: It's 4.

MR. SAFRIET: 4, thank you, Your Honor.

Q (By Mr. Safriet) Consists of 9 sheets of the erosion control line survey; does it not?

A Yes, it does.

Q And that incorporates or encompasses the entire section of the Walton County beach renourishment?

A Four plus miles.

Q All right. We didn't highlight every sheet on there. I believe we highlighted –

A But I highlighted the sheet that my house is on.

Q Where your property is located. For the record, if you can, give me the identify [sic] as far as the number of your parcel of property?

[161] A This is sheet 7 of 9.

Q And what's the number of your property?

A My property is 217.

Q 217.

MR. SAFRIET: Your Honor, I move petitioner's exhibit 4 into evidence.

MR. PLANTE: No objection, Your Honor.

JUDGE JOHNSTON: It's received.

MR. SAFRIET: And, Your Honor, just for convenience, I think I have some smaller versions of that, if you would like them at the conclusion of the hearing.

JUDGE JOHNSTON: Well, I drove here so I can put it in my car. I'll be able to read it easier plus it will have the markings on it.

MR. SAFRIET: Okay.

Q (By Mr. Safriet) And, Mr. Lindsey –

A Yes.

Q And as indicated on that drawing, petitioner's exhibit 4, construction will occur between – if you could pick it up for a second?

A Yes.

Q Now, the current property line is the orange line; correct?

A Correct.

[162] Q Okay. So construction is going to be proposed between your property line, on your property, landward of the orange line; correct?

A Yes.

Q And your property line will stop at the orange line; correct?

A Correct.

Q The new line will be the yellow line; correct, where the water actually touches the sand?

A Yes.

Q And between – as far as your property is concerned –

MR. MILLER: Excuse me, what new line, you just said the new line –

MR. SAFRIET: The yellow line which indicates where the new waterline will exist after the proposed construction.

JUDGE JOHNSTON: Well, obviously, maybe Mr. Miller's problem with that is there is no one waterline. What it is, it's the new – what's anticipated to be the new mean high water line.

MR. MILLER: Anticipated.

JUDGE JOHNSTON: At the time when the construction is completed?

MR. SAFRIET: Correct. As proposed as the new [163] mean high water line; correct. I didn't mean to insinuate that it was anything other than that.

Q (By Mr. Safriet) So as proposed on those drawings, Mr. Lindsey, your property line, seaward of your property line will be added approximately how many feet of dry sandy beach?

MR. PLANTE: Objection, Your Honor.

MR. SAFRIET: As proposed.

MR. PLANTE: The relevance of the ECL. I mean, it was mentioned in passing. That's not being questioned here. The petition challenging the ECL and all discussion has been withdrawn. It's not part –

JUDGE JOHNSTON: This is not being converted into a challenge of the ECL. But I think it may not – may persuade me otherwise, but at this time it seems like it may well be relevant to know where it is in relationship to what's going on with this permit.

MR. SAFRIET: It's relevant, Your Honor, because it establishes –

JUDGE JOHNSTON: I agree, so you may proceed.

Q (By Mr. Safriet) Mr. Lindsey –

A Yes.

Q So on your piece of property, the distance [164] between the existing mean high water line as indicated in the orange and the proposed mean high water line for construction indicated in yellow, is approximately how many feet of dry sandy beach?

A My guesstimate 50 to 80 feet. And I think that will vary as time comes and goes.

MR. SAFRIET: No further questions.

CROSS EXAMINATION

Q (By Mr. Plante)

BY MR. PLANTE:

Q Good afternoon, Mr. Lindsey.

A How are you?

Q Fine. Thank you. I don't need that. You're not professing to be an expert in coastal construction, are you?

A Not even close.

Q When Mr. Safriet asked you if you – how would you be affected by the water quality, you indicated that you and the members would be affected by it?

A Correct.

Q Exactly how?

A It's my understanding the turbidity is going to change the quality of the water, certainly for a short term. Perhaps for a longer term. We swim in the water, we snorkel in the water. We even rent some property and [165] it will affect our economic businesses, also.

Q What is your understanding for how long the turbidity will last?

A I don't know.

Q So, your statement is it will affect you but you're not quite sure for how long?

A I think that's correct. It could be – it could be – I don't know the period of time and I don't know if anybody in this room does, either.

MR. PLANTE: I have no further questions, Your Honor.

JUDGE JOHNSTON: Redirect.

MR. SAFRIET: No redirect.

JUDGE JOHNSTON: Thank you. You may be excused.

MR. SAFRIET: I call Linda Cherry for Save our Beaches, Incorporated.

THEREUPON:

LINDA CHERRY,

having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. SAFRIET:

[166] Q Good afternoon, Ms. Cherry. Can you state your name and address for the record, please?

A Linda Cherry. 3484 Scenic Highway, 98.

Q Do you own property within the city of Destin, Okaloosa County?

A I do. Yes.

Q And is that property -- how many parcels of property do you own?

A I have 11 parcels. Four of them are beachfront.

Q And how many of those properties are within the beach renourishment project as proposed by the City?

A The 4 that are on the beach. Four.

Q And those four properties on riparian rights, are they on properties of the mean high water line?

A Yes.

Q And that's indicated in the deed or plat in the official County records?

A Yes.

Q You're testifying here today as a representative of Save our Beaches?

A Yes.

Q Are you also a member of Save our Beaches?

A I am.

Q Are you an officer or director of Save our [167] Beaches?

A I am.

Q Can you briefly describe to me what Save our Beaches, Incorporated, is?

A A group of neighbors actually started this after the first public hearing. We call ourself beachfront owners of Destin and later we incorporated as Save our Beaches, Inc.

Q I'm sorry. What are the purposes of Save our Beaches?

A Basically, to protect the beaches from illegal, unauthorized or inappropriate beach restoration. And to protect our private property rights.

Q Similar to Stop the Beach Renourishment, do the articles of incorporation for Save our Beaches reflect that purpose and intent?

A Yes.

Q And I've just handed you what we'll mark as petitioner's exhibit 5. Is that a true and accurate copy of the articles of incorporation for Save our Beach, Incorporated filed with the Secretary of State of Florida?

A Yes, it is.

MR. SAFRIET: And I move exhibit 5 into evidence, Your Honor.

[168] MR. PLANTE: No objection.

JUDGE JOHNSTON: It's received.

Q (By Mr. Safriet) Explain to me the constituency of the membership of Save our Beaches, Incorporated, please?

A It's basically made of people who own on the beach, whether they have riparian rights as a private property owner or as a condo owner. There are some members that have owned beachfront property who have moved, who still have an interest in the organization.

Q How are the substantial interests of the members of Save our Beaches affected by the proposed beach renourishment project and the joint coastal permit?

A Well, it will certainly be affected by the water quality. They are going to be affected by having their riparian rights adversely impacted and taken away. In some cases –

Q Will the members of Save our Beaches be injured if the project exceeds turbidity standards?

A Yes.

Q Will the members of Save our Beaches be injured as a result of project interference with those member's riparian rights?

A Absolutely.

Q Will a substantial number of SOB members, or [169] Save our Beaches members be injured or substantially affected by the beach renourishment project?

A Yes.

Q Is the subject matter, beach renourishment project and joint coastal permit within the Save our Beaches general scope of interests and activity?

A Yes.

Q What relief does Save our Beaches seek on behalf of its members?

A We would like to have the permit denied.

Q Ms. Cherry, you are an officer of Save our Beaches; correct?

A Correct.

Q On behalf of Save our Beaches, have you solicited affidavits from members of Save our Beaches?

A Yes. Some of our members, yes.

Q And have you obtained affidavits from several members indicating their substantial interests?

A Yes.

Q And how that will be affected by the proposed project?

A Yes.

Q I've handed you what we will mark petitioner's exhibit 6. Is that a true and accurate copy of the numerous affidavits?

[170] A Yes, it is.

KELLY PLANTE: Can we get clarification of numerous?

MR. SAFRIET: I was going to do that myself.

Q (By Mr. Safriet) Can you count those for me, Ms. Cherry and indicate how many affidavits that is, please?

Q Count them.

A Twenty-two.

Q I'm sorry.

A Twenty-two.

Q Twenty-two. Okay. Thank you. And since you've obtained those twenty-two affidavits, which was in preparation for the initial hearing scheduled in February, have you received additional affidavits from members of Save our Beaches?

A I have.

Q Let me hand you what we'll mark petitioner's exhibit 7.

KELLY PLANTE: Are they the same in substance?

THE WITNESS: No.

MR. SAFRIET: Some forms –

KELLY PLANTE: Okay. Thank you.

Q (By Mr. Safriet) How many additional affidavits were submitted?

[171] A Seventeen. But one of them has a married couple on it. So I don't know if you count that as 17 or 17 or 18.

Q Okay.

A There are – they have both individual signatures. So 17 or 18, depending on how you're counting.

Q Thank you. And, generally, tell us about the composition of the membership of Save our Beaches, as far as classes of memberships?

A Okay. Our bylaws allow for two levels. Voting members who are made up of those people who made a contribution of $500 or more to Save our Beaches. And then we have a level of members who have not made or have made contributions – not made contributions or made contributions of less than $500.

Q And approximately how many members of Save our Beaches are there?

A Well, there's probably 150. We do it by property listing. So there's 112 properties that are members. So that probably is about 150 individuals.

Q How many of those individuals or members own riparian property?

A Sixty-two.

Q Such that borders the mean high water line, [172] sixty-two?

A Uh-huh.

Q Okay. Thank you. Ms. Cherry, earlier you heard Ms. Chabot testify regarding the beach scrapping [sic], that it was conducted only below the mean high water line, only in wet sand and moved forward. Is that a true statement?

A That is not true. We were so concerned about the way the scraping was being done. The permit allowed for a one foot scrapping [sic]. It was evidence that it was much greater than that. We went out; we took pictures. We called DEP and asked them to please have somebody come on site because the description of how they were to do the scraping had been ignored and the permit was being abused.

Q And they were scraping actually dry sand as opposed to wet sand; correct?

A Yes.

Q And let me hand you several pictures that I believe you took and you actually witnessed the scraping; correct?

A I did not. These pictures were made by another neighbor on the beach.

Q Okay.

A But I've seen these pictures and they certainly [173] show that they were in dry sand.

Q And those pictures indicate bulldozers or front end loaders, actually in dry sand scraping sand?

A Correct.

Q Did DEP ever respond and send anybody out to verify whether the permit was being complied with.

MR. PLANTE: Objection, Your Honor. The scraping permit is not part of this proceeding.

MR. SAFRIET: It goes to reasonable assurance with complying with the permit, Your Honor.

MR. PLANTE: The permit –

JUDGE JOHNSTON: Well, first I don't know if it's even in evidence who the applicants of that permit were. But assuming that's the same as the applicants in this case –

MR. PLANTE: But we don't know that.

MR. SAFRIET: I'll inquire.

JUDGE JOHNSTON: All right.

Q (By Mr. Safriet) who are the applicants of the scraping permit?

A DEP granted the permit to the City of Destin for scraping one foot. And that was the limit of the scraping.

Q Okay.

A That's all they – every permit, is my [174] understanding, is a foot at a time.

Q Okay. And it's your testimony that they scraped more than that one foot?

A Scraped a good deal more than that. That's why we came out and took pictures. That's why we called DEP and asked them to send somebody on site to oversee the work. I am aware that when the job is contracted by the City of Destin, the City of Destin provided an employee out to oversee the work being done. The employee that was out there on a number of occasions. The only time that our people talked to him, it was the same person, it was a person from Parks and Recreation who said he had no background at all on beach work. He had no idea what was being done. He was just sent there to stay.

Q Okay. You said you notified DEP that they were violating the permit for the City of Destin?

A I did personally.

Q What was DEP's response?

A DEP said they would check into it.

Q Did the City obtain your permission to scrape sand on your property, your private property?

A No. Matter of fact, the first permit that we tried to – the first permit was granted in December, we attempted to stop. And DEP's legal consult, at that point, Mark Miller and Betsy Hewitt, believed they had [175] the agreement of Chuck Meister (phonetic), the City Manager, not to scrape –

MR. PLANTE: Objection. Hearsay.

JUDGE JOHNSTON: Now, it's getting pretty involved into the other permit. And this is all supposed to be reasons why there were no reasonable assurances in the renourishment case.

MR. SAFRIET: That's correct, Your Honor. The City keeps attempting to provide a reasonable assurance that it will later obtain the construction easement as permission to trespass onto these people's property to place the sand. This testimony is evidence that the City has already trespassed on this property without the permission of these private property owners. So the fact that they may or may not get a construction easement later, we submit to the Court is not reasonable assurance. Because they didn't obtain that permission in the first instance.

MR. PLANTE: Your Honor, there's no indication that this is same type of permit. Ms. Chabot testified it was an emergency permit. Before you are not any of the criteria, anything. We have Ms. Cherry talking about what she recalls. It's not before you. You have no idea, this Court has no [176] idea as to what the permit conditions are whether they were required the assurances. It's irrelevant.

MR. MILLER: Your Honor, the construction easements are not part of the permit, either.

JUDGE JOHNSTON: I'm going to sustain the objection.

MR. SAFRIET: Your Honor, if I could, the record, that the requirement 18-21004 requires that evidence to be provided with the application, not after. That's all of the testimony. With that, I'll rest.

JUDGE JOHNSTON: Actually, you've rested. Those are not moved in evidence. Are you planning on the affidavits?

MR. SAFRIET: The affidavits were moved, I believe, or were they not? I want to move the affidavits, 6 and 7 or 7 and 8.

JUDGE JOHNSTON: It's 6 and 7.

MR. SAFRIET: I would like to admit the two sets of affidavits.

JUDGE JOHNSTON: Any objection?

MR. PLANTE: No objection. About the affidavits?

JUDGE JOHNSTON: Yes, the affidavits?

[177] MR. PLANTE: Yes, the same objection. Hearsay.

JUDGE JOHNSTON: Same objection. Before I rule, let me inquire, do the affidavits distinguish between beachfront owners and other members?

MR. SAFRIET: No, Your Honor. The affidavits only talk about the substantial interest with respect to the turbidity requirements and the inability of the members to enjoy the water, swimming, and maybe snorkeling and that such. It doesn't address riparian rights.

JUDGE JOHNSTON: The same ruling on the objection and I'll receive them over the objection.

MR. MILLER: And, Your Honor, the photos –

MR. SAFRIET: The photos are being withdrawn.

JUDGE JOHNSTON: Mr. Plante.

CROSS EXAMINATION

BY MR. PLANTE:

Q Ms. Cherry, you testified as to the number of members of Save our Beaches. What is that figure based on?

A The 112 is based on a property, on a parcel or a property.

Q And the number –

A So, in some instances, both husband and wife are members. And in some cases they're single property [178] owners where we only have one member per property.

Q How many riparian members did you indicate?

A Sixty-two.

Q Sixty-two. And what is that based on?

A Those are members who owned mean high water line.

Q Have you reviewed any deeds or any other documents to verify that they are the owners?

A We have gone online and gotten parcel numbers for each of them.

Q But you've not reviewed any deeds?

A No.

Q So, you can not say whether or not all the individuals are riparian owners?

A Their names appear on the map that the City put out as waterfront property owners.

Q But you have no independent corroboration of that, did you?

A No. We took their word for it. If they said they were waterfront property owners and their name appeared on tax record and their name and/or address was on the list of property owners, the maps coming from the City, we presumed that they owned waterfront.

Q But that's a presumption that's never been checked?

[179] A Correct.

Q You testified that you and, I guess all the of [sic] the members will be affected, adversely affected by the diminished – what is your understanding, having sat through this, of the water quality issue?

A Well, the water quality issue, you know, I'm not sure anybody can sit up here and talk exactly of what the water quality issue is. They've talked about samples and percentage of sediments. Obviously, there's some question about the water quality, once the project is done and just how long it's going to take to stabilize.

Q Well, you've heard testimony that it was not going to be in front of any one person's property more than a day and the sediment will settle within a couple of hours. So we're looking at a couple of hours of turbidity. That's less than a storm.

A I don't know that I can say to that. I'm not an expert. When you try to pin down experts earlier, would it take an hour to settle down, they couldn't answer that. I mean, this is being done on samples.

Q Right. But you testified that the basis for your opinion that it will be affected, you and the members, is it that this petitioner's members were looking at or swimming, fishing or boating in turbid waters?

[180] A Yeah. I think our enjoyment of that water, certainly standing out and wading and seeing the fish at your feet are going to be affected.

Q Are you on the beach everyday?

A When I'm here, yes.

Q And how long are you here, how often?

A Oh, once every two or three weeks.

Q So this entire project can be done without even affecting you or you know that it's going to be there?

A I doubt that.

Q Okay. It could be done without even affecting your turbidity if it's performed in front of all of your houses, your property, during the time frame you're gone, you'd never know that it happened?

A I doubt that.

Q Well, you would know that it happened, you wouldn't have seen it physically if you weren't here since it's moving from about 400 to 500 feet a day?

A I would probably be here the whole time, if this ever happens, that it's being down, I'll be here to watch my properties.

Q Do you go swimming at the beach during winter?

A No, but I wade sometimes.

Q And you wade, where do you wade?

A In front of the property.

[181] Q Just in front of the property?

A Uh-huh.

Q And have you ever traversed, gone laterally along the beach in the City of Destin?

A Sure.

Q In front of other people's property?

A Sure. Yeah.

Q Now, in our – in our interrogatories and our request for production, we asked you to identify all documents relied upon in determining petitioner's members of owners of riparian properties and you objected. It seeks information about each member that is beyond the scope of the property. And it further says, petitioner's members ownership of riparian uplands is irrelevant to this proceeding. Do you recall stating that under oath?

A Would you ask me the question, again?

MR. SAFRIET: Objection. It's something signed by an attorney, not verified statement of fact by a witness. I'm not sure if that was a legal objection or what.

JUDGE JOHNSTON: Well, I'm not sure either. I think if it's an objection that would be – well, I'll overrule the objection. You may inquire.

MR. PLANTE: And, Your Honor, the material that I submitted to the court this morning, these [182] interrogatories are signed by Linda Cherry of her own.

Q (By Mr. Plante) Looking at your articles of incorporation, anybody that shares their views, your views or the views of your organization can become a member?

A Yes.

Q You don't have to be a riparian owner?

A Correct.

Q You don't have to live in the State of Florida?

A Correct.

Q So anybody that just sends you a check can become a member?

A We don't have anybody who has given us a check who is not an owner of some property at that two mile stretch.

Q Owner of some property – you have members who haven't – who haven't given you a check who are still members?

A Correct.

Q How do you become a member?

A By telling us you want to be a member, that you share our views.

Q That's it?

A That's it.

[183] Q Is there any voting requirement to accept people?

MR. SAFRIET: Your Honor, I object. This is really irrelevant to whether or not the corporation has standing and whether or not the members are substantially affected or now, how the corporation transacts business. I didn't think we're piercing the corporate veil here.

MR. PLANTE: Your Honor, I don't think there's a corporate veil to pierce. I'm just trying to understand what this corporation is. And since they're here in a representative capacity, I would like to know a little bit more about the organization and its members.

JUDGE JOHNSTON: Overruled.

Q (By Mr. Plante) So writing to you, you let them know they're a member?

A We communicate with them.

Q That's it. Do you vote on it, I mean, is there a vote required?

A No.

Q (By Mr. Plante)

MR. PLANTE: Okay. No furthers [sic] questions, Your Honor.

Q (By Mr. Plante) Before Mr. Safriet objected, I [184] asked you if you recalled – I quoted part of the interrogatory that ownership is no longer – ownership of riparian uplands is irrelevant to this proceeding. Do you recall saying that?

A I don't recall at this point.

JUDGE JOHNSTON: Which – where do I find that in your filing?

MR. PLANTE: In response to respondent, City of Destin's first interrogatories, petitioner, Save our Beaches.

JUDGE JOHNSTON: Is it a tab number?

KELLY PLANTE: It was in Notice of Filing that was filed.

JUDGE JOHNSTON: Right. The version I have, a copy that was handed me this morning has tabs for each document. I was trying to find the documents. There are four of them in there. If you can repeat maybe, if you can repeat the title again I can find it. Okay. I've got it, number 3. And which interrogatory number?

MR. PLANTE: Question 7.

JUDGE JOHNSTON: Question 7.

MR. PLANTE: The answer last –

JUDGE JOHNSTON: Well, I guess I didn't find it.

[185] MR. LINDSEY: Page 8, question 7.

JUDGE JOHNSTON: All right. I have it now. I think I have it.

MR. PLANTE: Your Honor, I can move on.

JUDGE JOHNSTON: What I have, it indicates that Richard Brightman had signed the objection.

MR. PLANTE: He signed the objection but the overall response on the last page, I certify the forgoing responses are true and correct and to the best of my knowledge and they were signed by Ms. Cherry under oath.

MR. SAFRIET: She's not verifying an attorney's statement, Your Honor.

JUDGE JOHNSTON: All right.

MR. PLANTE: That the responses are true and correct to the best of my knowledge. Then we have an attorney on the other side saying that ownership –

JUDGE JOHNSTON: When I go to the questions, is the objection a response.

MR. PLANTE: Well, I would say an objection may not be a response, but since we asked the question and requested documents throughout here and known [sic] was forthcoming. We asked for copies all the deeds and were told that's irrelevant. So if it's [186] irrelevant for us in discovery, it should be

irrelevant in this proceeding and they shouldn't be allowed to discuss it. You can't sandbag us.

JUDGE JOHNSTON: You can argue that.

MR. PLANTE: That's fine, Your Honor.

JUDGE JOHNSTON: It probably should have been brought up at the beginning of the hearing if you were concerned about being sandbagged by it. But in any event –

THE WITNESS: I'm sorry. I'm kind of lost here.

JUDGE JOHNSTON: No, you're kind of out of the picture.

MR. PLANTE: Well, never mind. It's not a question of being sandbagged. I had no problem with the objection because the objection said it's irrelevant to this proceeding.

MR. SAFRIET: Your Honor, the objection has been turned to Constitutional issues that were removed from the petition. And there are Constitutional issues left in this petition.

JUDGE JOHNSTON: Well, I think there's perhaps, I will consider the arguments that are being made by Counsel for the City and the County based on this interrogatory response. But it doesn't require any [187] further involvement from the witness, is what I'm saying.

MR. PLANTE: No. I want to make sure that was available as a rebuttal when we write our PRO.

Q (By Mr. Plante) Ms. Cherry, do you know all the members of the organization?

A No. I'm familiar with the names. I know some of them.

Q But you don't have any personal knowledge of a lot of them?

A I don't have a personal knowledge of all of them.

Q Do you have a personal knowledge – strike that.

Do you know who prepared the affidavits?

A Each person was given an affidavit and they mailed it to us.

Q Okay. Who gave them – who prepared that affidavit that was sent to them?

A Well, we e-mailed it to the people who we had e-mail addresses for. And I presume that document probably came from our lawyers.

Q Okay.

MR. PLANTE: No further questions, Your Honor.

MR. MILLER: None from the Department. Thanks.

[188] REDIRECT EXAMINATION

BY MR. SAFRIET:

Q Ms. Cherry, on cross-examination it was mentioned whether you would be at your beach house standing at the beach every single second of the day of the year when this project might occur. At times when you're not at the beach house, do you have your own property where you rent to other people that are there?

A I do.

Q 24/7?

A Yes.

Q Fifty-two weeks a year?

A I wish.

Q And those persons would be substantially affected, as well?

A Absolutely.

Q And if you can not rent those properties, you will be substantially affected, as well?

A Uh-huh.

Q Do other officers have knowledge of all the members of Save our Beaches?

A I don't know if any person knows all of them. But, you know, we probably know a good many of them.

Q But collectively all of the officers would know the members; correct?

[189] A Uh-huh.

MR. SAFRIET: I have no further questions, Your Honor.

MR. PLANTE: No further questions, Your Honor.

JUDGE JOHNSTON: I just want to make sure I understand the count of the membership that you gave. I have notes here 112 –

THE WITNESS: Properties.

JUDGE JOHNSTON: Properties. In other words, members own 112 properties?

THE WITNESS: Yeah. And in some cases, there may be – you know, that's really off of a mailing list, for instance. So we may have two members per property. In some cases we have one member per property. So I'm assuming there's about 150 members that represents 112 properties. Now, of those 112 properties, some of those are going to be condos. So 62, 62 properties are fee simple owners.

JUDGE JOHNSTON: All right. Thank you.

THE WITNESS: I'm sorry. I know that's kind of confusing but we're all volunteers doing this as a neighbor effort. So our records aren't always great.

JUDGE JOHNSTON: That's pretty much how I had it, got it the first time, but I just wanted to make [190] sure. Thank you.

MR. SAFRIET: Your Honor, the petitioner rests.

JUDGE JOHNSTON: Is there any rebuttal evidence?

MR. PLANTE: Just a minute, Your Honor.

No, Your Honor.

JUDGE JOHNSTON: That concludes the evidence. And we made it with time to spare. I heard, I believe the City and County are ordering a transcript?

MR. PLANTE: Yes, Your Honor.

JUDGE JOHNSTON: And the time of post hearing submissions would normally then be within 10 days after the filing of the transcript. And then my Recommended Order should be within 30 days of the filing of the transcript. Anything else?

MR. SAFRIET: Can we have an estimate on when the transcript will be ready, Your Honor? I have vacation plans around the end of June, June 28.

JUDGE JOHNSTON: Off the record.

(Off the record discussion was held)

(Back on the record)

JUDGE JOHNSTON: If that happens –

MR. SAFRIET: Monday should be fine. That will be about, what, the 11th and then I'll have to the [191] 26th. That's fine.

Are there any page limitations or any other requirements for the Proposed Recommended Orders?

A No. I think – I don't remember if there are limitations in the Rule. But I don't expect anything overly lengthy. So I'm not too concerned about that. The format, you can pick up from orders that go out and that are on our website. And we use the Word Perfect, I mean, not Word Perfect, Microsoft Word. So, it would be helpful to get a diskette of your order or electronically transmitted so it can be used in preparation for our Recommended Order.

Anything else? If not, that concludes the proceedings. Thank you.

(WHEREUPON: The hearing was concluded)

[192] [CERTIFICATE OF REPORTER OMITTED IN PRINTING]

Florida Division of Administrative Hearings

Case No. 04-2960

Environmental Assessment
Walton County/Destin Beach Restoration Project

Prepared for

Walton County and Destin, Florida

by

Taylor Engineering, Inc.
9000 Cypress Green Drive, Suite 200
Jacksonville, FL 32256
(904) 731-7040

C2003-020/021

September 2003

* * *

3.1.3 Littoral Transport

Littoral transport analyses indicate primarily westerly net longshore transport along the project area. Net longshore transport rates, ranging from 47,000 cy/yr near R-23 in Walton County to approximately 30,000 cy/yr near R-39 in Destin, reveal an accretive trend. Taylor Engineering, Inc. (2003) concludes that the project area beaches possess the natural ability, as indicated by the accretive longshore sediment transport trend, to recover absent storms; however, insufficient recovery times between storms have caused the present unhealthy beach conditions.

* * *

STATE OF OH

COUNTY OF Montgomery

AFFIDAVIT OF LIONEL D. ALFORD, JR.

Affiant, LIONEL D. ALFORD, JR., being first duly sworn, does testify and state:

1. I am a member of Stop the Beach Renourishment, Inc., a Florida Not-for-Profit Corporation incorporated for the purpose (among other purposes) of opposing the proposed Walton/Okaloosa County Beach Renourishment project.

2. I personally use the beaches and waters of the Gulf of Mexico adjacent to the beaches in Walton/Okaloosa County, Florida, for swimming, fishing, boating, and/or enjoying beach and Gulf vistas.

3. If the proposed Walton/Okaloosa County Beach Renourishment project were to cause violations of the applicable water quality standard for turbidity, such violation would interfere with my use of the beaches and waters of the Gulf of Mexico adjacent to the beaches in Walton/Okaloosa County, Florida, for swimming, fishing, boating, and/or enjoying beach and Gulf vistas, because such beaches and waters would be less attractive for such uses during any such violations.

4. Further, Affiant sayeth not.

I declare, under penalty of perjury under the laws of the State of Florida, that the foregoing is true and correct.

Dated 12 Feb 2005

Signature: /s/ LIONEL D. ALFORD, JR.

Print Name: LIONEL D. ALFORD, JR.

Sworn to (or affirmed) and subscribed before me this 12 day of Feb , 2005, by LIONEL D. ALFORD, JR. .

/s/ Faustina Miller
Signature of Notary

/s/ FAUSTINA MILLER
Printed Name of
Notary or Seal

FAUSTINA M. MILLER,
Notary Public
In and for the State of Ohio
My Commission Expires
May 14, 2007

Personally Known _____
OR Produced Identification x .

Type of Identification Produced
US Uniformed SVS ID .

STATE OF OH

COUNTY OF Montgomery

AFFIDAVIT OF _____

Affiant, Tammy N. Alford, being first duly sworn, does testify and state:

1. I am a member of Stop the Beach Renourishment, Inc., a Florida Not-for-Profit Corporation incorporated for the purpose (among other purposes) of opposing the proposed Walton/Okaloosa County Beach Renourishment project.

2. I personally use the beaches and waters of the Gulf of Mexico adjacent to the beaches in Walton/Okaloosa County, Florida, for swimming, fishing, boating, and/or enjoying beach and Gulf vistas.

3. If the proposed Walton/Okaloosa County Beach Renourishment project were to cause violations of the applicable water quality standard for turbidity, such violation would interfere with my use of the beaches and waters of the Gulf of Mexico adjacent to the beaches in Walton/Okaloosa County, Florida, for swimming, fishing, boating, and/or enjoying beach and Gulf vistas, because such beaches and waters would be less attractive for such uses during any such violations.

4. Further, Affiant sayeth not.

I declare, under penalty of perjury under the laws of the State of Florida, that the foregoing is true and correct.

Dated 12 February 2005

Signature: /s/ Tammy N. Alford

Print Name: Tammy N. Alford

Sworn to (or affirmed) and subscribed before me this 12 day of Feb, 2005, by Tammy N. Alford.

/s/ Faustina Miller
Signature of Notary

/s/ FAUSTINA MILLER
Printed Name of
Notary or Seal

FAUSTINA M. MILLER,
Notary Public
In and for the State of Ohio
My Commission Expires
May 14, 2007

Personally Known _____
OR Produced Identification x.

Type of Identification Produced
OH DL # RK290601 Exp 7/6/07.

STATE OF FLORIDA

COUNTY OF WALTON

AFFIDAVIT OF JANET R. FROST

Affiant, JANET R. FROST, being first duly sworn, does testify and state:

1. I am a member of Stop the Beach Renourishment, Inc., a Florida Not-for-Profit Corporation incorporated for the purpose (among other purposes) of opposing the proposed Walton/Okaloosa County Beach Renourishment project.

2. I personally use the beaches and waters of the Gulf of Mexico adjacent to the beaches in Walton/Okaloosa County, Florida, for swimming, fishing, boating, and/or enjoying beach and Gulf vistas.

3. If the proposed Walton/Okaloosa County Beach Renourishment project were to cause violations of the applicable water quality standard for turbidity, such violation would interfere with my use of the beaches and waters of the Gulf of Mexico adjacent to the beaches in Walton/Okaloosa County, Florida, for swimming, fishing, boating, and/or enjoying beach and Gulf vistas, because such beaches and waters would be less attractive for such uses during any such violations.

4. Further, Affiant sayeth not.

I declare, under penalty of perjury under the laws of the State of Florida, that the foregoing is true and correct.

Dated FEBRUARY 14, 2005

Signature: /s/ Janet R. Frost

Print Name: JANET R. FROST

Sworn to (or affirmed) and subscribed before me this 14th day of Feb , 2005, by Janet R. Frost .

/s/ Julia S. Wilson
Signature of Notary

[NOTARY SEAL]

/s/ Julia S. Wilson
Printed Name of
Notary or Seal

Personally Known _____
OR Produced Identification ✓ .

Type of Identification Produced Florida DL .

STATE OF _____

COUNTY OF _____

AFFIDAVIT OF _____

Affiant, Mark Styslinger, being first duly sworn, does testify and state:

1. I am a member of Stop the Beach Renourishment, Inc., a Florida Not-for-Profit Corporation incorporated for the purpose (among other purposes) of opposing the proposed Walton/Okaloosa County Beach Renourishment project.

2. I personally use the beaches and waters of the Gulf of Mexico adjacent to the beaches in Walton/Okaloosa County, Florida, for swimming, fishing, boating, and/or enjoying beach and Gulf vistas.

3. If the proposed Walton/Okaloosa County Beach Renourishment project were to cause violations of the applicable water quality standard for turbidity, such violation would interfere with my use of the beaches and waters of the Gulf of Mexico adjacent to the beaches in Walton/Okaloosa County, Florida, for swimming, fishing, boating, and/or enjoying beach and Gulf vistas, because such beaches and waters would be less attractive for such uses during any such violations.

4. Further, Affiant sayeth not.

I declare, under penalty of perjury under the laws of the State of Florida, that the foregoing is true and correct.

Dated 3-18-05

Signature: /s/ Mark Styslinger

Print Name: Mark Styslinger

Sworn to (or affirmed) and subscribed before me this 18th day of March, 2005, by _____.

/s/ Connie Blanton Bradley
Signature of Notary

/s/ Connie Blanton Bradley
Printed Name of Notary or Seal

MY COMMISSION EXPIRES NOVEMBER 14, 2006

Personally Known ✓
OR Produced Identification _____.

Type of Identification Produced _____.

Excerpt from Petitioners Exhibit 4:
Mean High Water Line and Proposed Walton West Erosion Control Line for FDEP Range Monuments R-1 to R-22 Walton County, Florida, Sheets 1 and 7
Division of Administrative Hearings
June 7, 2005

[Sheets 1 And 7 Found In Pocket
On Inside Back Cover]

MEAN HIGH WATER LINE SURVEY
PROPOSED WALTON WEST EROSION CONTROL LINE
FOR DEEP RANGE MONUMENTS R-[illegible] TO R-22
WALTON COUNTY, FLORIDA

LENGTH 4.5 MILES ±

SECTIONS 29,30,32,33,34 & 35, TOWNSHIP 2 SOUTH, RANGE 21 WEST

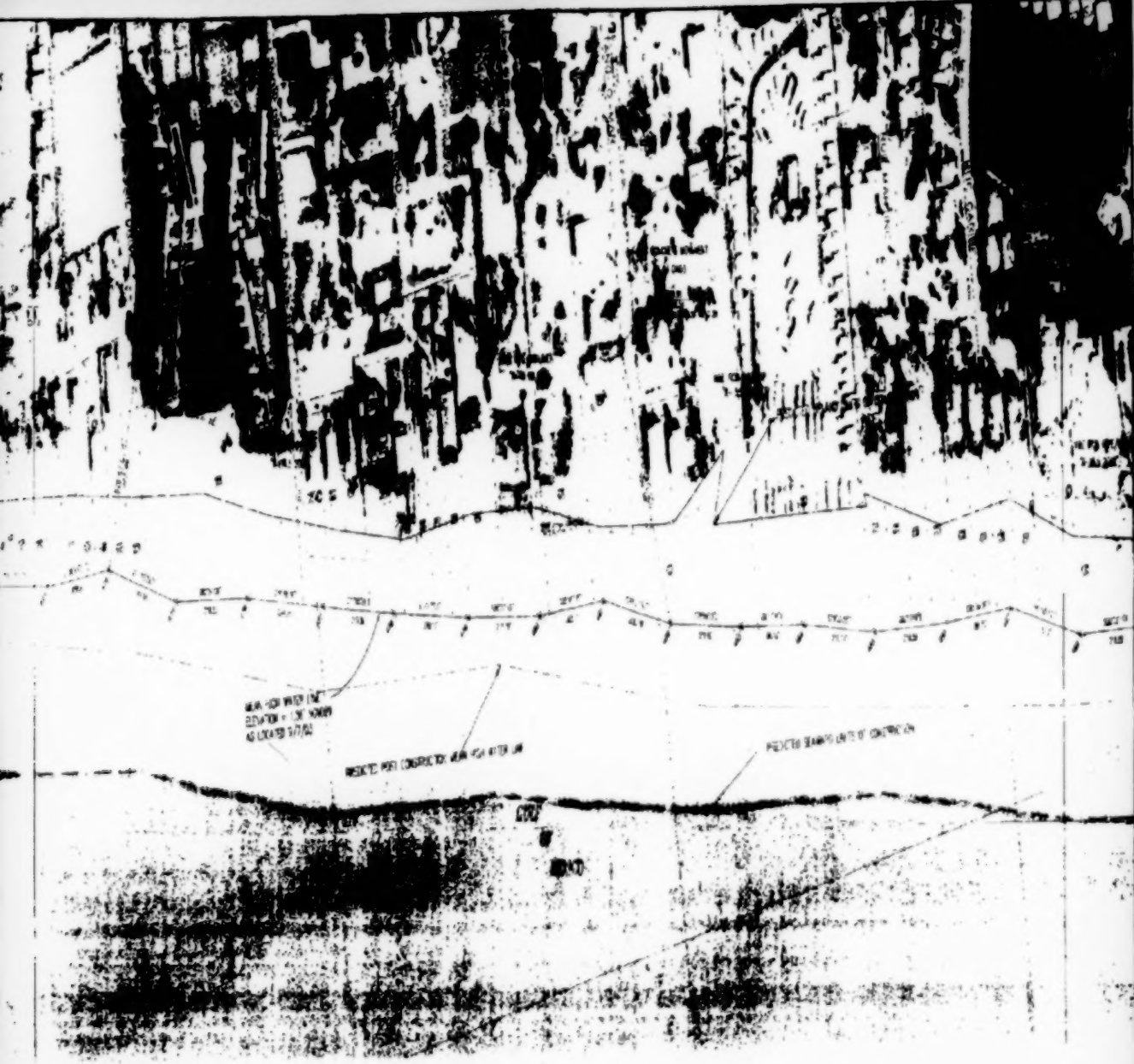
APPROVALS

MEAN HIGH WATER LINE
COORDINATE & ELLIPSOID VALUES

CONTROL TABLE

MORGAN & EKLUND, INC
PROFESSIONAL SURVEY CONSULTANTS

BEST AVAILABLE COPY



MORGAN & EKLUND, INC.

PROFESSIONAL SURVEY CONSULTANTS

MEAN HIGH WATER LINE
AND PROPOSED WALTON WEST EROSION CONTROL LINE
FOR FDEP RANGE MONUMENTS R-1 TO R-22
WALTON COUNTY, FLORIDA

IN THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT
STATE OF FLORIDA

SAVE OUR BEACHES, INC., and STOP THE BEACH RENOURISHMENT, INC.,

Appellants/Petitioners,

vs.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION and the BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND,

Appellees/Respondents. /

1st DCA Case No. 1D05-4086

DEP Case No. 04-1370

DOAH Case No. 04-2960 04-3261

APPELLANTS' MOTION FOR STAY

Appellants, SAVE OUR BEACHES, INC. and STOP THE BEACH RENOURISHMENT, INC., by and through their undersigned counsel, pursuant to Rules 9.190 and 9.300, Florida Rules of Appellate Procedure, move this Court for a Stay Pending Appellate Review. Appellants request a stay of the Final Order only as it applies to the properties owned by Appellants' members. In support thereof, Appellants state as follows:

Introduction

1. On July 27, 2005, DEP entered a final order in this case determining that a Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands (collectively "JCP") was properly issued pursuant to existing statutes and rules. *Save Our Beaches, Inc. v. Department of Environmental Protection,* DOAH Case Nos. 04-2960, 04-3261, DEP Final Order No. 04-1370. The Final Order expressly finds that Florida Statutes authorizing the issuance of the JCP eliminates common law private property rights protected by the Florida Constitution.

2. Appellant's filed a Motion for Stay with the Department of Environmental Protection (DEP) on August 30, 2005. *See* Exhibit A. Thereafter, DEP denied the Motion based on the premise that the Administrative Law Judge nor DEP considered the "constitutional validity of the erosion control line ("ECL") process under Part I of Chapter 161, Fla. Stat., (Beach and Shore Preservation Act). . . ." *See* Ex. A, ¶ 4.

3. DEP's conclusion is erroneous, ignores the pleadings in this case, and disregards the well established limitations on DEP's authority to consider constitutional issues.

4. Appellants clearly raised the very constitutional issues that are the basis for the Appellants' Motion for Stay in their December 14, 2004 Amended Petition. *See* Exhibit B. The Amended Petition alleged in part that:

a. the permit applicant for the Project has not provided the Department with reasonable assurances that applicable water quality standards will not be violated by the Project;

b. the Project will deny upland owners their legitimate and constitutional use and enjoyment of their properties;

c. the Project will result in a taking; and,

d. the local sponsors for the Project have not obtained all of the requisite private property rights necessary to implement the Project.

5. The permit applicants moved to dismiss the constitutional issues (issue b. and c. above) because the Administrative Law Judge as well as DEP lacks the authority to pass on constitutional issues. *See Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc.*, 361 So.2d 695, 699 (Fla. 1978), *Department of Transp. v. Morehouse*, 350 So.2d 529, 533 (Fla. 3d DCA 1977); *See* Exhibit C, City/County's Joint Motion to Dismiss Constitutional Issues.

6. After Appellants concurred with the dismissal of the constitutional issues because the ALJ and DEP lacked authority to consider them, the ALJ granted the Motion dismissing the same on January 21, 2005. *See* Exhibit D.

7. Now, despite the procedural history of the case, the DEP concludes, in its Order denying the Motion to Stay, that "neither the ALJ's Recommended Order nor the Department's Final Order now on appeal addresses or implicates the validity of the

statutory process for establishing the ECL on the subject beaches of the City and County." *See* Ex. A, ¶ 4.

8. DEP's claim that the constitutional issues were not addressed in the Recommended or Final Orders – when they admittedly have no ability to consider such[1] – should not be allowed to stand as a proper basis to deny the Motion for Stay. As a matter of law, the constitutional issues raised by the Appellants at the outset of the case can only be decided by a judicial tribunal. *See Gulf Pines Memorial Park, Inc.*, 361 So.2d at 699. Thus, it is not appropriate for DEP to summarily deny a stay because such contentions were not previously ruled upon.

9. Moreover, because DEP lacks the ability to address the constitutional issues – and failed to address them – its conclusions that the Appellants have not met the standards for issuance of a stay are

---

[1] *See Berger v. Southern Hy-Power Corp, et al.*, 1996 WL 271508, *3 (DEP Final Order, April 12, 1996) ("These Exceptions are merely recitations of previous arguments to the Hearing Officer which were properly rejected. . . . Administrative agencies do not have jurisdiction to dispose of constitutional claims. Florida case law holds that constitutional challenges to actions of administrative agencies and officials are for the judiciary alone. See, Myers v. Hawkins, 362 So.2d 926 (Fla.1978); Gulf Pines Memorial Park v. Oaklawn Memorial Park, 361 So.2d 695, 699 (Fla.1978); Hays v. Department of Business Regulation, 418 So.2d 331 (Fla. 3d DCA 1982); Adams Packing Ass'n v. Florida Department of Citrus, 352 So.2d 569, 571 (Fla. 2d DCA 1977). . . ."

irrelevant and inapplicable as they were based solely upon the issues DEP had the ability to decide. Accordingly, this Court must make a de novo review of the Motion to Stay in light of the constitutional issues only this court has the judicial authority to decide. *See also Gulf Pines Memorial Park, Inc.*, 361 So.2d 695.

Background of Final Order and Constitutional Consequences

10. As noted above, the Final Order expressly finds that Florida Statutes authorizing the issuance of the JCP at issue in this case eliminates common law private property rights protected by the Florida Constitution. Specifically, the Final Order states:

> Section 161.191(2), F.S., specifically eliminates the common law right to accretion in beach restoration and nourishment projects.
>
> * * *
>
> Whether or not correct under the common law, it is certainly the case under Sections 161.141-161.211, F.S., that the right to future accretion and the right of riparian land to touch the water have both been statutorily eliminated by act of the Legislature.
>
> * * *
>
> It is the establishment of the ECL and the process set forth in Sections 161.11-161.211, F.S., which might arguably be asserted as infringing on the common law rights of

> riparian owners. The issuance of the Joint Coastal Permit in accordance with the applicable statutes and implementing rules will not infringe on these riparian rights.

DEP Final Order, p. 5-6.

11. In its Final Order, DEP relied on the Beach and Shore Preservation Act's, Sections 161.11-161.221, Fla. Stat. ("Act") provisions eliminating protected property rights to justify issuance of the JCP. At the same time DEP's Final Order refused to require the JCP Applicants to first institute eminent domain proceedings to acquire the property rights to be eliminated, even though Section 161.141 Fla. Stat., provides that, "[i]f an authorized beach restoration, beach nourishment, and erosion control project cannot reasonably be accomplished without the taking of private property, the taking must be made by the requesting authority by eminent domain proceedings." As thus applied by DEP, Sections 161.11-161.211, Fla. Stat., result in the unconstitutional taking of private property without compensation.

12. DEP, in its Final Order, has ignored the constitutionally protected private property rights of Appellants' members that are at issue.

13. Upon the recording of the ECL, Appellants will be immediately divested of their constitutionally protected property rights and title to their littoral property will be immediately encumbered as provided in Section 161.191, Fla. Stat.

14. As a result of DEP's inaction, the JCP Applicants are presently free to record the ECL at any time, causing profound effects on the Appellants' members' properties.

15. Because the recording of the ECL will result in irreparable harm to Appellants, DEP should stay the effectiveness of its Final Order.

Standards for Issuance of a Stay

16. Rule 9.310(a), Florida Rules of Appellate Procedure, provides that an administrative agency has continuing jurisdiction to grant, modify or deny a stay in the effectiveness of its final order during the pendency of an administrative appeal.

17. The decision to grant or deny a stay "rests within the sound judicial discretion of the [lower tribunal]. . . ." *Polar Ice Cream & Creamery Co. v. Andrews,* 159 So.2d 672, 674 (Fla. 1st DCA 1964); *see also City of Sarasota v. AFSCME Council '79,* 563 So.2d 830 (Fla. 1st DCA 1990); *McQueen v. State,* 531 So.2d 1030, 1031 (Fla. 1st DCA 1988).

18. In ruling on a motion for a stay, a tribunal is to consider the moving party's likelihood of success on the merits and the likelihood of harm should a stay not be granted. *Perez v. Perez,* 769 So.2d 389, 391 n. 4 (Fla. 3d DCA 1999) (citing *State ex rel. Price v. McCord,* 380 So.2d 1037 (Fla. 1980)). The tribunal must also weigh whether "substantial damage" will result to the moving party if the stay is not issued.

Wait v. Florida Power & Light Co., 353 So.2d 1265, 1267 (Fla. 1st DCA 1974), *quashed in part and approved in part*, 372 So.2d 420 (Fla. 1979).

19. In addition, a stay should be granted to maintain the status quo. *Hathaway v. Munroe*, 97 Fla. 28, 32-33, 119 So. 149 (Fla. 1929). In *Hathaway*, the Supreme Court stated:

> A supersedeas is generally invoked to maintain the *status quo* of the property or of the rights constituting the subject matter of the litigation, pending appellate proceedings. In general a supersedeas will be granted if it will preserve the rights of the parties pending appellate review and if the record properly presents a substantial debatable question materially affecting the rights of the parties in the premises.

Id; *accord City of Miami Beach v. Lanburgh*, 217 So.2d 348, 349-50 (Fla. 3d DCA 1969); *Jerles Invest. Co., v. Wells*, 177 So 313 (Fla. 1937).

20. Here, the Appellants have a substantial likelihood of success on the merits. DEP merely states that the JCP was issued in compliance with Sections 161.11-161.211, F.S. It ignores the legal effect or constitutional impact of the Act and the JCP issued thereunder on the Appellants' members' properties. Thius [sic] is even though DEP's Final Order candidly determines common law riparian rights are eliminated by the Act.

21. It is well-established under Florida case law that ***all*** riparian or littoral rights are property rights protected by the constitution which cannot be taken without just and full compensation. *Board of Trustees of the Internal Improvement Fund v. Sand Key Assoc., Ltd.*, 512 So.2d 934 (Fla. 1987). Therein, the Florida Supreme Court stated:

> We have also held that riparian or littoral rights are legal rights and, for constitutional purposes, the common law rights of riparian and littoral owners constitute property.[2] Riparian and littoral property rights consist not only of the right to use the water shared by the public, but include the following vested rights: (1) the right of access to the water, including the right to have the property's contact with the water remain intact; (2) the right to use the water for navigational purposes; (3) the right to an unobstructed view of the water; and (4) the right to receive accretions and relictions to the property.[3] **In *Brickell*, we said these riparian or littoral rights are 'property rights that may be regulated by law, but may not be taken without just compensation and due process of law, *Brickell*, 77 Fla. [544] at 561, 82 So. [221]**

---

[2] Citing "*Hayes; Brickell; Thiesen; Feller v. Eau Gallie Yacht Basin, Inc.*, 397 So.2d 1155 (5th DCA 1981)."

[3] Citing "*Hughes v. Washington*, 389 U.S. 290, 88 S.Ct. 438, 19 L.Ed.2d 530 (1967); *County of St. Clair; Hayes; Brickell; Thiesen.*"

> **at 227, and we recently reaffirmed that principle in *Florida National Properties, Inc.***

512 So.2d at 936 (emphasis added).

22. Based on this long standing line of cases, the Appellants have a high likelihood of success on the merits. The Final Order determines that Appellants' members' riparian property rights will be eliminated. Thus, issuance of the JCP without requiring that the Applicants first acquire the property rights being eliminated results in an uncompensable taking. As thus applied by DEP, Appellants' members' littoral rights are being taken by the Act and the JCP without just compensation and due process of law.

23. Appellants will also be substantially harmed if the ECL is recorded and construction begun prior to the initiation of any eminent domain proceedings. Not only will such recordation create clouds on the title to numerous parcels of private property, but Appellants' members' due process rights to eminent domain proceedings will thereby be denied.

24. Appellants' members are no less irreparably harmed because they may be able to bring an inverse condemnation action, as such a remedy is inadequate. Inverse condemnation and eminent domain proceedings do not provide equivalent due process. The Florida Supreme Court specifically recognized this in *Joint Ventures, Inc. v. Department of Transp.*, 563

So.2d 622, 627 (Fla. 1990) (footnotes omitted) wherein it stated:

> DOT contends that Joint Ventures' right to seek compensation through inverse condemnation cures the statute's failure to expressly provide for compensation. We disagree. Although the right to seek relief through inverse condemnation is implied in the constitution and a compensation provision need not be expressly included for an owner to be entitled to such compensation, *see First English*, that remedy is not equivalent to a property owner's remedy under the doctrine of eminent domain. Inverse condemnation affords the affected property owner an after-the-fact remedy, when there has already been a "taking" by regulation, and it is not a substitute for eminent domain protection facilitated by chapters 73 and 74.
>
> The property owner who must resort to inverse condemnation is not on equal footing with an owner whose land is "taken" through formal condemnation proceedings. The former has the burden of seeking compensation, must initiate the inverse condemnation suit, and must finance the costs of litigation without the procedural protections afforded the condemnee.

25. Because Appellants have established they enjoy a substantial likelihood of success on the merits and will be substantially harmed if the ECL is recorded with respect to their properties, DEP should have, and this Court now should issue a stay of the

Final Order with respect to the properties of Appellants' members.

26. Furthermore, a stay is required to maintain the status quo. *Hathaway, supra.*

27. It is even more important that this Court grant the requested stay because, as noted above, the DEP or ALJ did not (and could not) consider the constitutional ramifications of DEP's issuance of the JCP. It is only now, before this Court, that a tribunal has had jurisdiction to consider the same. *See also Gulf Pines Memorial Park, Inc.*, 361 So.2d 695.

WHEREFORE, Appellants respectfully request this Court to enter an Order staying the effectiveness of DEP's Final Order solely as it relates to the properties of Appellants' members.

HOPPING GREEN & SAMS, P.A.

/s/ D. Kent Safriet

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[Certificate Of Compliance And
Certificate Of Service Omitted In Printing]

DISTRICT COURT OF APPEAL, FIRST DISTRICT
Tallahassee, Florida 32399-1850
Telephone No. (850) 488-6151

November 7, 2005

CASE NO.: 1D05-4086
L.T. No.: 04-1370

Save Our Beachs, Inc. And Stop The Beach Etc.	v.	Florida Department Of Environmental Etc., Et Al
Appellant/Petitioner(s),		Appellee/Respondent(s).

BY ORDER OF THE COURT:

This court has considered appellants' motion for stay and the response thereto. It finds that appellants primarily rely upon constitutional issues which are not at issue in this administrative appeal but are being litigated in circuit court. Accordingly, the motion for stay is denied without prejudice to appellants' right to seek available remedies in the circuit court.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

Richard S. Brightman D. Kent Safriet Mark S. Miller
Kenneth J. Plante Charles T. Collette
am

/s/ Jon S. Wheeler [SEAL]
JON S. WHEELER, CLERK

IN THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT
STATE OF FLORIDA

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION and the BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND, CITY OF DESTIN, and WALTON COUNTY,

Petitioners,

vs.

SAVE OUR BEACHES, INC., and STOP THE BEACH RENOURISHMENT, INC.,

Respondents.
/

1st DCA Case No. 1D05-4086
DEP Case No. 04-1370
DOAH Case No. 04-2960
04-3261

AFFIDAVIT OF TAMMY ALFORD

STATE OF KANSAS
COUNTY OF SEDGWICK

BEFORE ME, the undersigned authority, appeared the Affiant TAMMY ALFORD, and having taken an oath, Affiant, based on personal knowledge, deposes and says:

1. I am over 18 years of age and competent to testify as to the matters contained herein.

2. I am and have been the President of Stop the Beach Renourishment, Inc. ("STBR") since its inception in February 2004.

3. I own littoral property in Walton County within the proposed Beach Renourishment Project ("Project") that was authorized by a Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands (Permit Number 0218419-001-JC) by the Florida Department of Environmental Protection ("DEP") and Board of Trustees of the Internal Improvement Trust Fund ("Trustees").

4. As an owner of littoral property within the Project, I received a "construction easement" from Walton County and was requested to execute the same.

5. This construction easement would grant Walton County the right to enter my privately owned property to place sand pursuant to the Project as well as the right to enter my private property for years thereafter to maintain the Project.

6. I did not execute the construction easement nor did I give the County any other permission to enter my private property.

7. Other members of STBR, including my husband Lionel Alford, Slade Lindsey, Janet R. Frost, and Mark Styslinger, did not execute construction agreements providing the County with permission to enter their littoral properties to carry out the Project.

8. On December 1, 2005, the County and their Contractor, Great Lakes Dredge and Dock Company, were specifically informed through STBR's attorneys, that they did not have permission to enter the private

properties of Lionel Alford, Slade Lindsey, Janet R. Frost or myself.

9. Notwithstanding this specific notice to not enter private property, on March 27, 2006, the County Commission voted 5-0 to restore the entire span of beach "including those areas where the property owners are in opposition" and refused to "by-pass" those properties. *See* Attachment A, March 27, 2006, County Commission Minutes, p. 7. (Attachment A is a true and accurate copy of the March 27, 2006 approved minutes as posted on the Walton County Clerk of Courts' website by the Clerk).

10. Subsequently, Great Lakes expressed concern over the County Commission's direction to enter private properties and place sand where property owners objected and requested the County Commission to modify the contract to not require Great Lakes to enter properties where property owners objected and withheld permission. *See* Attachment B, April 11, 2006, County Commission Minutes, p. 5. (Attachment B is a true and accurate copy of the April 11, 2006 approved minutes as posted on the Walton County Clerk of Courts' website by the Clerk).

11. On April 11, 2006, the County Commission rejected Great Lakes request to modify the contract by a 5-0 vote. *See* Attachment B, April 11, 2006, County Commission Minutes, p. 5.

12. Despite the County's direction to renourish the entire beach – notwithstanding lack of permission

to enter the property – Great Lakes never renourished the beach in front of my (and husband Lionel's) property, Slade Lindsey's property, or Janet Frost's property.

13. Great Lakes did conduct renourishment activities (which included depositing sand on privately owned property) on the properties of STBR members Mark Styslinger and Suzy Spence.

14. On May 25, 2006, the U.S. Army Corps of Engineers suspended the Project until October 1, 2006 because the Project had killed four endangered turtles.

15. The DEP issued a Notice to Proceed for the Project on December 20, 2005.

16. I declare, under penalty of perjury under the laws of the State of Florida, that the foregoing is true and correct to the best of my knowledge.

FURTHER AFFIANT SAYETH NAUGHT.

Dated July 27, 2006.

/s/ Tammy Alford
TAMMY ALFORD

Sworn to and subscribed before me this 27 day of July, 2006, by TAMMY ALFORD who is personally

known to me or who has produced Driver's License as identification.

/s/ Kerri Webster
Notary Public

/s/ Kerri Webster
Printed Name of Notary

KERRI WEBSTER
[LOGO] Notary Public – State of Kansas
My Appl. Expires 12-8-06

EXHIBIT A

March 27, 2006 – Special/Regular MeetinG [sic]

* * *

The Board took a brief recess at 4:00 p.m. and reconvened at 4:10 p.m. into the Regular Meeting. Commissioner Cuchens led with prayer followed by the Pledge of Allegiance to the American Flag. Chairman Brannon called the meeting to order.

* * *

Mr. Brad Pickel, Director of Beach Management, discussed the issues regarding the upcoming Western Walton County Beach Restoration Project. He stated that the project is going well and moving 300-400 feet per day. He requested the Board's direction regarding three property owners who requested that the area of beach in front of their homes not be renourished. Mr. Pickel explained that the county's options are to restore the entire beach or to bypass those homes. He explained that bypassing that area would create

a low-lying area which would be prone to future damage. Attorney Hallman felt that the county would be subject to litigation regardless of the chosen action. He explained that the Board has the inherent police power to restore the entire beach, including those where owners are in objection. Mr. Pickel felt that it is in the county's best interest to restore the entire span of beach.

Motion by Commissioner Cuchens, second by Commissioner Pridgen, to continue the restoration project including the areas where the property owners are in opposition. Ayes 5, Nays 0. Jones Aye, Meadows Aye, Pridgen Aye, Brannon Aye, and Cuchens Aye.

* * *

Mr. Pickel presented a request for the Board to send a letter to FDEP to secure funds for post project monitoring funds for the western Walton County project and the Federal Feasibility Study. He stated that the letter had to be submitted before the March 31st deadline. A copy of the letter from FDEP to Mr. Bell was submitted.

Motion by Commissioner Meadows, second by Commissioner Pridgen, to allow staff to draft a letter of response to FDEP in order to secure the funds as requested by Mr. Pickels [sic]. Ayes 5, Nays 0. Jones Aye, Meadows Aye, Pridgen Aye, Brannon Aye, and Cuchens Aye.

Mr. Pickel gave a brief report on the beach renourishment project. He stated that a more in depth report would be given at the April 25th BCC Regular Meeting.

* * *

EXHIBIT B

APRIL 11, 2006-REGULAR MEETING

The Board of County Commissioners, Walton County, Florida, held a Regular Meeting on Tuesday, April 11, 2006, at 4:00 p.m. at the South Walton Courthouse Annex.

* * *

Mr. Pickel turned the floor over to Attorney Hallman to discuss a letter received from Great Lake Dredge & Dock Company, LLC, the contractor for the Walton County/Destin Beach Restoration Project. The company expressed concern regarding previous direction from the Board to place sand on the beach despite protests from beachfront property owners. The company alleged that representatives of some of the property owners threatened that they would be sued for trespass if they proceeded to place sand under the contract. The company requested a modification to the current contract to release them from their responsibility to indemnify the City of Destin and Walton County. Mr. Hallman recommended the Board respectfully reject the proposal to modify the contract.

The letter and photographs of the subject property were entered into the record.

The Board ensued discussion.

Motion by Commissioner Cuchens, second by Commissioner Pridgen, to reject the proposal to modify the contract. Ayes 5, Nays 0. Jones Aye, Brannon Aye, Cuchens Aye, Pridgen Aye, and Meadows Aye.

PETITIONER'S BRIEF

No. 08-1151

Supreme Court, U.S.
FILED
JUL 13 2009
OFFICE OF THE CLERK

In The Supreme Court of the United States

STOP THE BEACH RENOURISHMENT, INC.,

Petitioner,

v.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND, WALTON COUNTY, and CITY OF DESTIN,

Respondents.

On Writ of Certiorari
to the Florida Supreme Court

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

The Florida Supreme Court invoked "nonexistent rules of state substantive law" to reverse 100 years of uniform holdings that littoral rights are constitutionally protected. In doing so, did the Florida Court's decision cause a "judicial taking" proscribed by the Fifth and Fourteenth Amendments to the U.S. Constitution?

Is the Florida Supreme Court's approval of a scheme that eliminates constitutional littoral rights and replaces them with statutory rights a violation of the Due Process and Takings Clauses of the Fifth and Fourteenth Amendment to the U.S. Constitution?

Is the Florida Supreme Court's approval of a scheme that allows an executive agency to unilaterally modify a private landowner's property boundary without notice, a judicial hearing, or the payment of just compensation a violation of the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution?

LIST OF PARTIES

Petitioner

Stop the Beach Renourishment, Incorporated, is the sole Petitioner and is not publicly traded.

Respondents

Florida Department of Environmental Protection; The Board of Trustees of the Internal Improvement Trust Fund; Walton County, Florida; and the City of Destin, Florida.

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The Opinion of the Supreme Court of Florida, *Walton County v. Stop the Beach Renourishment, Inc.*, Nos. SC06-1447 and SC06-1449, 998 So. 2d 1102 (Fla. 2008), *entered* Sept. 28, 2008, is reprinted in the Petition for Certiorari Appendix at Pet. App. 1.

The Order of Florida Supreme Court Denying Motion for Rehearing, *Walton County v. Stop the Beach Renourishment, Inc.*, Nos. SC06-1447 and SC06-1449, 998 So. 2d 1102, *entered* Dec. 18, 2008, is reprinted in the Petition for Certiorari Appendix at Pet. App. 136.

The unpublished order granting certification of the Florida First District Court of Appeal, *Save Our Beaches, Inc. v. Florida Department of Environmental Protection*, No. 1D05-4086, 31 Fla. L. Weekly D1811, 2006 WL 1112700 (Sept. 29, 2006), *entered* July 3, 2006, is reprinted in the Petition for Certiorari Appendix at Pet. App. 59.

The unpublished opinion of the Florida First District Court of Appeal, *Save Our Beaches, Inc. v. Florida Department of Environmental Protection*, No. 1D05-4086, 31 Fla. L. Weekly D1173, 2006 WL 1112700 (July 7, 2006), *entered* Apr. 28, 2006, is reprinted in Petition for Certiorari Appendix at Pet. App. 61.

The unpublished Final Order of the Florida Department of Environmental Protection Final Order, *Save Our Beaches, Inc. v. Florida Department of Environmental Protection*, Final Order No.

DEP:05097871, DOAH Case Nos. 04-2960 and 04-3261, DEP No. 04-1370, *entered* July 27, 2005, is reprinted in the Petition for Certiorari Appendix at Pet. App. 88.

The unpublished Recommended Order of the Florida Division of Administrative Hearings, *Save Our Beaches, Inc. v. Florida Department of Environmental Protection*, Nos. 04-2960 and 04-3261, 2005 WL 1543209, 05 194 Envtl. & Land Use Admin. L. Rep. 3 (Jan. 1, 2006), *entered* June 30, 2005, is reprinted in the Petition for Certiorari Appendix at Pet. App. 101.

JURISDICTION

This Court has jurisdiction to review the Opinion of the Florida Supreme Court on a Petition for Writ of Certiorari pursuant to 28 U.S.C. Section 1257. The Florida Supreme Court's Opinion was entered on September 29, 2008. On December 18, 2008, the Florida Supreme Court denied Petitioner Stop the Beach Renourishment, Inc.'s Motion for Rehearing. This Court granted certiorari on June 15, 2009.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment of the U.S. Constitution provides, in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be

taken for public use, without just compensation.

The Fourteenth Amendment of the U.S. Constitution provides, in pertinent part:

> SECTION 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Florida Statutes Section 161.141 provides:

> **Property rights of state and private upland owners in beach restoration project areas.**--The Legislature declares that it is the public policy of the state to cause to be fixed and determined, pursuant to beach restoration, beach nourishment, and erosion control projects, the boundary line between sovereignty lands of the state bordering on the Atlantic Ocean, the Gulf of Mexico, or the Straits of Florida, and the bays, lagoons, and other tidal reaches thereof, and the upland properties adjacent thereto; except that such boundary line shall not be fixed for beach restoration projects that result from inlet or navigation channel maintenance dredging projects

unless such projects involve the construction of authorized beach restoration projects. However, prior to construction of such a beach restoration project, the board of trustees must establish the line of mean high water for the area to be restored; and any additions to the upland property landward of the established line of mean high water which result from the restoration project remain the property of the upland owner subject to all governmental regulations and are not to be used to justify increased density or the relocation of the coastal construction control line as may be in effect for such upland property. The resulting additions to upland property are also subject to a public easement for traditional uses of the sandy beach consistent with uses that would have been allowed prior to the need for the restoration project. It is further declared that there is no intention on the part of the state to extend its claims to lands not already held by it or to deprive any upland or submerged land owner of the legitimate and constitutional use and enjoyment of his or her property. If an authorized beach restoration, beach nourishment, and erosion control project cannot reasonably be accomplished without the taking of private property, the taking must be made by the requesting

authority by eminent domain proceedings.

The remaining citations to state statutes are set forth in the Appendix to Petitioner's Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The mental picture often conjured by a beach nourishment project is one of relentless waves of water lapping menacingly against or under beach-front structures, which, without the beach nourishment, face imminent collapse into the sea. Nothing could be further from the facts in this case. Prior to the nourishment, Petitioner's members' homes sat on an accreting beach more than 200 feet of dry sand and dunes from the Mean High Water Line ("MHWL"). App. 252, 261.[1]

Notwithstanding such an expanse of beach, Respondents pursued their singular goal of replacing a private beach with a public beach without paying compensation by creating an additional 75-foot wide public beach seaward of the MHWL surveyed on September 7, 2003. App. 261. Stop the Beach Renourishment, Inc.'s ("STBR" or "Petitioner") members objected to this massive sand pumping exercise to create this new public beach because they did not want or need the additional sand. App. 276-77.

Respondents will, no doubt, attempt to claim a nobler goal, asserting that the beaches in question were designated as a "critically eroded shoreline,"[2]

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[1] In this Brief, citations to the Joint Appendix are denoted "App." with the relevant page number(s), and citations to the Appendix to Petitioner's Petition for Writ of Certiorari are denoted "Pet. App." with the relevant page number(s).

[2] *See* Fla. Admin. Code R. 62B-36.002(4). Unless noted, this Brief cites the 2003 version of Florida Statutes and administrative regulations as they existed when this case

which condition threatened upland development, recreational interests, wildlife habitat or important cultural resources. Such assertions are, however, belied by Respondents' own survey of the beach. App. 261. Moreover, the critically eroded label is merely a unilateral determination by the Florida Department of Environmental Protection ("DEP") that is a prerequisite to state funding. App. 76.

Respondents' scheme, however, conflicts with 100 years of Florida's background property law, which provides that the littoral rights attendant to ocean front property are constitutionally protected property rights. These background principles of Florida property law include direct and exclusive access to the ocean and the right to accretions or alluvion.[3]

Over the last 100 years, background principles of Florida property law have steadfastly required that property owners own to the MHWL in order to be littoral owners and possess littoral rights. During this century, Florida has uniformly held these rights to be constitutionally protected from

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began. Since 2003, no relevant changes to the statutes or regulations have been made. *See generally* Fla. Stat. ch. 161 (2008); Fla. Admin. Code ch. 18-21 (2008).

[3] Florida courts use the terms "littoral" and "riparian" interchangeably; the term "riparian" technically refers to property abutting a river or stream, and the term "littoral" refers to property abutting an ocean, sea, or lake. *See Board of Trustees v. Sand Key Assocs., Ltd.* (*Sand Key*), 512 So. 2d 934, 936 (Fla. 1987). STBR will attempt to use the term "littoral" throughout this Brief, whenever possible.

governmental appropriation without due process and fair compensation.[4]

The Florida Legislature, by enacting the Beach and Shore Preservation Act, Florida Statutes chapter 161 ("Act"), altered this well-established law to allow severance of an oceanfront property owner's contact with the MHWL by a beach nourishment project. The Florida Legislature failed to include proper procedural due process provisions in the Act which, instead, directs the executive branch to unilaterally alter and replace a property owner's boundary line (i.e., the MHWL) for a 6.9 mile stretch of beach with a fixed "Erosion Control Line" ("ECL"). App. 28.

The Florida Legislature, aware that this scheme could result in a taking of littoral property, provided that: "If an authorized . . . beach nourishment . . . project cannot reasonably be accomplished without the taking of private property, the taking must be made by the requesting authority by eminent domain proceedings." Fla. Stat. § 161.141. Despite the Florida Legislature's recognition that it was changing common law littoral rights, the executive branch (DEP and the Board of

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[4] In *Broward v. Mabry*, 50 So. 826, 830 (Fla. 1909), and *Thiesen v. Gulf, Fla. & Ala. Ry. Co.*, 78 So. 491, 507 (Fla. 1917), the Florida Supreme Court held riparian rights are property rights that cannot be taken without just compensation, which principle has been applied unchanged by the Court in *Sand Key*, 512 So. 2d at 936; *Belvedere Dev. Corp. v. Dep't of Transp.*, 476 So. 2d 649, 652 (Fla. 1985); *State v. Fla. Nat'l Prop., Inc.* (*Florida National*), 338 So. 2d 13, 17 (Fla. 1976); *Brickell v. Trammell*, 82 So. 221, 227 (Fla. 1919).

Trustees of the Internal Improvement Trust Fund) interpreted and applied the Act in a manner that did not require the requesting authority (i.e., City of Destin and Walton County) to take the littoral rights by eminent domain proceedings as contemplated by Florida Statutes section 161.141. App. 176-78.

This application and interpretation of the Act required STBR to challenge the constitutionality of the Act as applied by the executive branch. In upholding the application of the Act, the Florida Supreme Court sided with the executive branch and decided that no taking of property or due process violation occurred. Pet. App. 40. In so doing, however, the Florida Supreme Court suddenly and dramatically changed 100 years of state property law to achieve its desired outcome. Pet. App. 40.

In 2003, the City of Destin ("City") and Walton County ("County") sought approval from DEP and the Board of Trustees of the Internal Improvement Trust Fund ("Board of Trustees") to restore 6.9 miles of beach in the City and County after several hurricanes washed sand away from the beaches in the City and County. App. 28, 30. The City and County applied for a Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands (collectively "JCP") from DEP to place sand landward and seaward of the MHWL as authorized by the Act. App. 27.[5]

Once an applicant decides to move forward with a beach nourishment project the Act requires

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[5] The City and County may hereafter be referred to collectively as the "Applicants."

the Board of Trustees to conduct a survey of the beach in order to establish the ECL. Fla. Stat. § 161.161(3). The import of the required adoption and recording of the ECL survey is a change of property boundaries:

> **title to all lands seaward of the erosion control line shall be deemed to be vested in the state by right of its sovereignty**, and title to all lands landward of such line shall be vested in the riparian upland owners whose lands either abut the erosion control line or would have abutted the line if it had been located directly on the line of mean high water on the date the board of trustees' survey was recorded.

Fla. Stat. § 161.191(1) (emphasis added).

The Act lacks any predeprivation procedural protections to the landowner before the Board of Trustees unilaterally changes the property boundary. To the contrary, the Act's procedural provisions are a facade. The Act only provides for interested persons to "submit their views" at a public hearing. Fla. Stat. § 161.161(4).

Following this "public hearing," the Board of Trustees is required to approve (or disapprove) the proposed ECL for a project, after which the Act requires the ECL survey to be recorded in the official records of the county.[6] Fla. Stat. § 161.181. In this

[6] The resolutions approving the ECL for the City and County were adopted on December 30, 2004, and June 25,

case, the Respondents modified 6.9 miles of property boundaries through the simple recording of two surveys (affecting up to 453 individual properties, five of which belong to STBR's members)[7] without any judicial approval. App. 191-92, 201.[8]

The engineering requirements of a beach nourishment project require sand to be placed both seaward and landward of the ECL. Sheet 7 of Petioners' Exhibit 4 is a color coded survey of the beach that presents a pictorial view of the beach and the limits of construction and placement of sand landward and seaward of the ECL. App. 261. Typically, a local government conducting the restoration has to obtain written permission or "construction easements" for its contractor to enter the private property landward of the ECL to place tons of sand on such private property. App. 276-77.

During the pendency of the various appeals, the City and the County completed the beach nourishment project notwithstanding the potential invalidation of their permit. App. 277-78. Numerous oceanfront landowners refused to execute "construction easements" and forbade the County and its contractor from trespassing onto their

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2004, respectively. Pet. App. 112; App. 49-51; *see also* Walton County, Fla., Official Records, Book 2686, Page 2233; Okaloosa County, Fla., Official Records, Book 2658, Page 4124.

[7] App. 207, 211; Pet. App. 84-85.

[8] *See* App. 261. These two ECL surveys have been recorded in the official records of the appropriate counties. Walton County, Fla., Plat Book, Book 17, Page 1; Okaloosa County, Fla., Plat Book, Book 22, Page 53.

property and dumping tons of sand, changing the character of their property. App. 276. The County Commission demanded that its contractor enter private property to place sand as required by the engineering specifications notwithstanding the lack of permission from the landowners. App. 277-82.[9]

Once the ECL is recorded, the Act provides that "the common law shall no longer operate to increase or decrease the proportions of any upland property lying landward of such line, either by accretion or erosion or by any other natural or artificial process . . . ." Fla. Stat. § 161.191(2).[10] While this provision of the Act specifically eliminates the 100 year old constitutionally protected littoral right to accretion, the recording of the ECL also eliminates all other littoral rights since the property boundary no longer touches the ambulatory MHWL. *Id.*

After severing all littoral rights from the uplands, the Act attempts to replace some of these constitutional property rights with **similar but inferior** statutory rights (i.e., lacking constitutional protection).[11] The Act acknowledges that

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[9] It should be noted that the County's contractor trespassed upon the property of two STBR members but not the other three. App. 277-78.

[10] The Amicus Brief filed by Pacific Legal Foundation before the Florida Supreme Court thoroughly argued and explained how the setting of the ECL, in and of itself, was a physical taking under the U.S. Constitution. Pet. App. 191-202.

[11] Florida Statutes section 161.201 states in part:

> Any upland owner or lessee who by [establishment of an ECL] ceases to be a holder of title to the mean high-

establishing an ECL in connection with a beach restoration project can result in a taking of constitutionally protected littoral property rights by expressly providing that all property rights necessary for the nourishment project be acquired by eminent domain. Fla. Stat. § 161.141. This provision, however, relies upon a court for enforcement. In this case, the Florida Supreme Court not only sanctioned an uncompensated taking by not enforcing this provision, but created an uncompensated taking by going one step further and invoking "nonexistent rules of substantive state law" to redefine property out of existence so that it could not be taken.

Given the effect of the Act on its members' property rights, STBR[12] filed an administrative petition challenging DEP's Notice of Intent to Issue the JCP and adoption of the ECL. App. 27-48. The administrative challenge centered on whether littoral rights were "unreasonably infringed" by the JCP and ECL such that the Applicants would have to provide "sufficient evidence of upland interest" to be entitled to a JCP. Fla. Admin. Code R. 18-21.004(3)(b).

Whether littoral rights were infringed included a determination of whether littoral rights

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water line shall, nonetheless, continue to be entitled to all common-law riparian rights except [the right to accretion], including but not limited to rights of ingress, egress, view, boating, bathing, and fishing.

[12] STBR is a Florida not-for-profit corporation with six members who all own riparian property within the proposed project. App. 210-11.

were eliminated by the Act. STBR asserted that the JCP and ECL would: 1) deny upland owners their legitimate and constitutional use and enjoyment of their properties; and 2) result in a taking. App. 61. While these two issues were not (and could not be) decided in the administrative hearing by the Administrative Law Judge ("ALJ") or DEP, the Florida First District Court of Appeal did decide these issues on direct appeal. Pet. App. 77-87.

A unanimous panel of the First District Court of Appeal found the case simple given well-established Florida law, holding that the adoption of the ECL resulted in an uncompensated taking of littoral rights and invalidating the ECL. Pet. App. 85-87.[13]

The Florida Supreme Court reversed in a result driven opinion that suddenly and dramatically changed 100 years of background property law in Florida. Specifically, and as discussed in detail below in Part I(B), the Florida Supreme Court's majority redefined two littoral rights (right to have the property remain in contact with the MHWL and the right to accretion) to no longer exist. Pet. App. 40. The majority then concluded, not surprisingly, that such littoral rights were not taken. Pet. App. 33-35.

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[13] The First District Court of Appeal found that a legislative alteration of a private property owner's boundary that was contrary to the owner's deed effected an unconstitutional taking and invalidated the ECL to any such properties. Pet. App. 81-84, 86-87.

In a candid dissent, Justice Lewis did not mince words in explaining what the majority did:

> I cannot join the majority because of the manner in which it has "butchered" Florida law in its attempted search for equitable answers to several issues arising in the context of beach restoration in Florida. In attempting to answer these questions, the majority has, in my view, unnecessarily created dangerous precedent constructed upon a manipulation of the question actually certified. Additionally, I fear that the majority's construction of the Beach and Shore Preservation Act is based upon infirm, tortured logic and a rescission from existing precedent under a hollow claim that existing law does not apply or is not relevant here. Today, the majority has simply erased well-established Florida law without proper analysis . . . .

Pet. App. 41-42.

STBR then filed a Motion for Rehearing arguing, inter alia, that the majority's decision itself violates the U.S. Constitution. Pet. App. 140-48. The Florida Supreme Court denied STBR's Motion for Rehearing on December 18, 2008, and in so doing suddenly, dramatically, and radically changed 100 years of Florida law by invoking non-existent rules of state law. On June 15, 2009, this Court granted STBR's Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

In an effort to avoid paying compensation for taking private property, State courts sometimes "redefine" well-established property rights by declaring that they never existed so that nothing was taken. In so doing, state courts claim to be invoking background principles of state law as a justification for the elimination of once well-established property rights.

For a century, the Florida Supreme Court has held that littoral rights "are property rights that may be regulated by law, but may not be taken without just compensation and due process of law." *Broward*, 50 So. at 830. In a result driven opinion upholding the application of the State's beach nourishment program, the Florida Supreme Court invoked nonexistent rules of state substantive law, finding that no property rights have been taken because none existed.

The Florida Supreme Court ignored 100 years of Florida law that requires a property to contact the MHWL to possess littoral rights. The Florida Supreme Court conveniently concluded that "under Florida common law, there is no independent [littoral] right of contact with the [MHWL]." Pet. App. 36. The Florida Supreme Court also held for the first time that the littoral right to accretion was a "contingent future interest" rather than a presently vested right to future accretions, in direct contradiction of its holding in *Florida National*, 338 So. 2d at 17. Pet. App. 20, 34. The Florida Supreme Court further completely ignored its holding in *Florida National* that the setting of a permanent

boundary line between riparian upland property and sovereign submerged lands was a violation of the Florida and U.S. constitutions.

The Florida Supreme Court also created a hitherto unknown constitutional duty for the State to "protect beaches" presumably as a counterbalance to the takings clause of the Florida Constitution. Pet. App. 16. Finally, the Florida Supreme Court tried to camouflage its change in state law with the common law doctrine of avulsion. Pet. App. 29-33, 40. If dry land suddenly and violently washes away as a result of a natural event (such as a hurricane), this doctrine, allows an owner of the upland to "reclaim" previously dry–but now submerged–land. But the State, not owning any washed away dry land, has lost nothing and thus cannot reclaim anything under this doctrine.

This Court's prior cases provide a sound doctrinal basis for adopting a judicial takings doctrine. Specifically, this Court should adopt the judicial takings test articulated by Justice Stewart in *Hughes* that a state judicial decision effects a taking under the U.S. Constitution when it "constitutes a sudden change in state law, unpredictable in terms of relevant precedents." *See Hughes v. Washington*, 389 U.S. 290, 296 (1967) (Stewart, J., concurring).

This Court has expressly held that the Equal Protection and the Due Process Clauses apply to state judiciaries. The Takings Clause should apply to state courts as well. Without such a doctrine, a state is free to clothe one of its agents with the

power to violate the U.S. Constitution. *Ex Parte Virginia*, 100 U.S. 339, 346 (1879).

The Florida Supreme Court's blessing of the application of the Act (and its redefining of property rights) to eliminate constitutionally protected littoral rights and replace them with statutory rights without requiring eminent domain proceedings as required in Florida Statutes section 161.141 is an unconstitutional taking. Lost in this exchange of rights are STBR's members' ability to own, possess, and exclude persons from the beach between their homes and the MHWL. Rather, after the recording of the ECL and the beach nourishment, commercial vendors are allowed on the beach between the ECL and the new MHWL in front of STBR's members' homes.

The Board of Trustees' changing of the property boundary from the MHWL to the ECL is a physical taking. The Act and the Board of Trustees' recording of the ECL change the legal descriptions in STBR's members' deeds and physically divests them of all littoral rights. Because of the way the Act was applied with full sanction of the Florida Supreme Court, the Board of Trustees now holds what STBR's members once held: property to the MHWL and its attendant constitutionally protected littoral rights. No longer do STBR's members possess, use, or have the ability to dispose of littoral property or littoral rights. The state has severed each strand in STBR's members' bundle of property rights. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 (1982). But the state paid no compensation for the privilege of owning STBR's members' property.

The Act's provisions violate the procedural due process protections of the U.S. Constitution. The State's recording of the ECL changing the boundaries of STBR's members' real property deprives them of a property right. The Act's procedural provisions do not provide any meaningful opportunity to be heard prior to the deprivation. Rather, they allow the Board of Trustees (through an agent) to unilaterally record a survey changing property boundaries without any judicial oversight or approval.

REASONS FOR GRANTING THE WRIT

I. The Florida Supreme Court's Decision Is a Judicial Taking Because It Is a Sudden and Dramatic Change in State Law Unpredictable in Terms of Relevant Precedents.

The concept that a state court's ruling that suddenly and dramatically eliminates long established common law property rights is proscribed by the Takings Clause of the Fifth Amendment is not new. It has existed since this Court held the Fifth Amendment was applicable to States through the Fourteenth Amendment in *Chicago Burlington & Quincy Railroad Co. v. Chicago* (*Chicago Burlington*), 166 U.S. 226, 241 (1897).

A state court's use of its power to redefine property to no longer exist in order to avoid a taking has become a significant problem. This problem was recognized by Professor Thompson in his seminal law review article on judicial takings: "Faced by

growing environmental, conservationist, and recreational demands, . . . state courts have recently begun redefining a variety of property interests to increase public or governmental rights, concomitantly shrinking the sphere of private dominion." Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449, 1451 (1990) ("Indeed, while paying lip service to stare decisis, the courts on numerous occasions have reshaped property law in ways that sharply constrict previously recognized private interests.").

STBR respectfully requests that this Court expressly recognize the doctrine of judicial takings and adopt the judicial takings test articulated by Justice Stewart in his concurring opinion in *Hughes*, 389 U.S. 290. This test provides that a state judicial decision effects a taking under the U.S. Constitution when it "constitutes a sudden change in state law, unpredictable in terms of relevant precedents . . . ." *Id.* at 296.

A. Relevant precedents in Florida law.

In 1909, the Florida Supreme Court announced that littoral rights are "incident to the [littoral] holdings, and are property rights that may be regulated by law, but may not be taken without just compensation and due process of law." *Broward*, 50 So. at 830. Since then the Florida Supreme Court has expressly reaffirmed this holding no less than six times. *See Thiesen,* 78 So. at 507; *Hayes v. Bowman*, 91 So. 2d 795 (Fla. 1957); *Brickell*, 82 So. at 227; *Florida National*, 338 So. 2d at 17; *Belvedere Dev. Corp.*, 476 So. 2d at 652; *Sand Key*, 512 So. 2d at 936 (noting that the court had

recently reaffirmed this holding in *Florida National*). These littoral rights include the right to exclude others from the littoral property. *Board of Trustees v. Medeira Beach Nominee, Inc.*, 272 So. 2d 209, 214 (Fla. 2d DCA 1973) (beachfront owners "have the exclusive right of access over their own property to the water.").

These 100 years of consistent jurisprudence, which will be discussed in more detail in Parts I(B)(1)-(2) below, establish beyond debate the background principle of Florida law that "littoral rights are property rights that . . . may not be taken without just compensation and due process of law," *Brickell*, 82 So. at 227, and that an attempt to establish an inflexible property boundary between sovereign submerged lands and riparian uplands is a violation of the Florida and U.S. constitutions. *Florida National*, 338 So. 2d at 17.[14]

B. The invocation of "nonexistent rules of state substantive law" that effect a sudden and dramatic change in state law constitutes a judicial taking.

In reaching its desired outcome, the Florida Supreme Court invoked "nonexistent rules of state substantive law," *Stevens v. City of Cannon Beach*,

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[14] The most simplistic summary of Florida law regarding littoral rights is found in *Dep't of Transp. v. Suit City of Aventura*, 774 So. 2d 9, 13 (Fla. 3d DCA 2000), stating "The distinction between riparian and non-riparian rights is a clear one. Lost riparian rights always entitle the owner to relief . . . ."

510 U.S. 1207, 1207 (1994) (Scalia, J., and O'Connor, J., dissenting from denial of the petition for writ of certiorari), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), in an attempt to camouflage its breathtaking change of 100 years of law.

Ironically, DEP and the Board of Trustees now argue that the common law has not changed, while the City and the County acknowledge that the Act and the Florida Supreme Court have modified state common law property rights–just not in an unconstitutional fashion.[15]

There can be little doubt about the effect of the Florida Supreme Court's decision upholding the application of the Act without requiring compensation. Before the Florida Supreme Court's

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[15] Respondent Florida Department of Environmental Protection's Brief in Opposition at 11-13, *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Protection*, No. 08-1151 (Apr. 30, 2009); Respondents Walton County and City of Destin's Brief in Opposition to Petition for Writ of Certiorari at 15-16, *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Protection*, No. 08-1151 (Apr. 30, 2009).

DEP and the Board of Trustees' current position is inconsistent to say the least with its position in its Final Order:

> Whether or not correct under the common law, it is certainly the case under Sections 161.141-161.211, F.S. that the right to future accretion and the right to have riparian land to touch the water have both been statutorily eliminated by act of the Legislature. . . . It is the establishment of the ECL and the process set forth in Sections 161.141-161.211, F.S., [and not the issuance of the JCP permit,] which might arguably be asserted as infringing on the common law rights of riparian owners.

Pet. App. 93-94.

decision STBR's members' rights under a century of common law included at least the following littoral rights:

- Right to future accretion or reliction;
- Right to have property remain in contact with the MHWL;
- Right to an unobstructed view; and
- Right to exclusive access over the upland portion of their property to the water.

After the Florida Supreme Court's decision, their modified rights include:

- No right to accretion or reliction;
- No right to have property remain in contact with the MHWL, only a right to own to the ECL;
- Statutory right to a view; and
- Statutory nonexclusive right to access to the water across the new public beach like every other citizen.

As Justice Stewart noted in his judicial takings test, the "Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does." *Hughes*, 389 U.S. at 298. *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* (*First English*), 482 U.S. 304, 335 n.11 (1987) (Stevens, J., dissenting) (quoting this language with approval). In this case, what the State has done is obvious. The Florida Supreme Court's strained rationale and judicial reengineering of the case and the law only highlight its motive to reach a predetermined

outcome while pretending that no littoral rights are implicated, infringed, or eliminated.

Laying the foundation for this sudden and radical change of state law to achieve the desired result and admitting 100 years of precedent have held that littoral rights are constitutionally protected, the majority suddenly declares, "the exact nature of these rights rarely has been described in detail." Pet. App. 18. The majority focused only on "redefining" the two littoral rights that the First District Court of Appeal expressly found were eliminated and taken. The majority also created a new constitutional duty and invoked the inapplicable doctrine of avulsion as an alleged background principle of law to try to camouflage its dramatic change in state law. These issues will be discussed in turn.

1. The redefined and changed littoral right of contact with the MHWL.

It is beyond argument that Florida law has always required a property to touch or border the MHWL in order to be a littoral property with attendant littoral rights.[16] Justice Lewis, in his dissent, concisely chronicled the historical Florida law:

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[16] *See Sand Key*, 512 So. 2d at 936 ("[The Florida Supreme Court] has expressly adopted the common law rule that a riparian or littoral owner owns to the line of the ordinary high water mark on navigable waters.").

> By essential, inherent definition, riparian and littoral property is that which is contiguous to, abuts, borders, adjoins, or touches water. In this State, the legal essence of littoral or riparian land is contact with the water. Thus, the majority is entirely incorrect when it states that such contact has no protection under Florida law and is merely some "ancillary" concept that is subsumed by the right of access. In other words, the land must touch the water as a condition precedent to all other riparian or littoral rights and, in the case of littoral property, this touching must occur at the MHWL.

Pet. App. 43-44 (footnotes and citations omitted) (emphasis in original).[17]

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[17] The dissenting opinion provides the following citations as authority for its position:

> Brickell v. Trammel, 82 So. 221, 229-30 (Fla. 1919) (explaining that under Spanish civil law and English common law, private littoral ownership extended to the high-water mark); Miller v. Bay-to-Gulf, Inc., 193 So. 425, 427 (Fla. 1940) ("[I]t is essential that [the property owners] show the ordinary high water mark or ordinary high tide of the Gulf of Mexico extended to their westerly boundary in order for them to be entitled to any sort of [littoral] rights . . . ." (emphasis supplied)); Thiesen v. Gulf, Fla. & Ala. Ry. Co., 78 So. 491, 500 (Fla. 1918) ("At common law lands which were bounded by and extended to the high-water mark of waters in which the tide ebbed and flowed were riparian or littoral to such waters." (emphasis supplied)).

Pet. App. 44 (emphasis in original).

The majority does not dispute this contention; it simply ignores this fundamental condition of contact with the MHWL that is precedent to the existence of **all** littoral rights.[18] If the upland property is separated from the MHWL, then the entire property is no longer littoral in character, and all littoral rights are lost.

The majority attempted to sidestep this background law by simply claiming, "We have never addressed whether littoral rights are unconstitutionally taken based solely upon the loss of an upland owner's direct contact with the water." Pet. App. 36. The majority then invokes the following "non-existent rule of state substantive law" to find no taking of littoral rights occurs when a property's boundary is severed from the MHWL: "under Florida common law, there is no independent right of contact with the water [or MHWL]. Instead contact is ancillary to the littoral right of access to the water." Pet. App. 36.

Not surprisingly, the majority fails to cite a single case to support this previously non-existent background principle of state law. To the contrary, it silently overrules its previous holding in *Sand Key*, 512 So. 2d at 936, that "littoral property rights . . . include the following **vested** rights: (1) the right of access to the water, **including the right to have**

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[18] Even the Act itself acknowledges this principle. Fla. Stat. § 161.201 ("Preservation of common-law rights.--Any upland owner or lessee who by [establishment of an ECL] ceases to be a holder of title to the mean high-water line . . . ."); Pet. App. 36-40.

the property's contact with the water remain intact . . . ." (emphasis added).

The majority does not acknowledge this overruling because doing so would be an obvious admission that it has created a new background principle of state law, which eliminates littoral rights. This new rule of law is at odds with all other Florida precedent. Never before has the Florida Supreme Court suggested, much less held, that a littoral property does not have to touch the MHWL for the littoral owner to have a constitutionally protected littoral right of access. Such holding directly contradicts the Florida Supreme Court's previous holdings, and is thus completely unpredictable in the context of relevant precedents.

Even assuming that the right to have the property remain in contact with the water is part of the littoral right to access, the majority does not explain why the elimination of this part of the heretofore constitutionally protected littoral right of access is not an uncompensated taking. Instead, the majority ignores the fact that the littoral right of **exclusive** access has been completely eliminated by the Act, and replaced with a statutory right of **nonexclusive** access, concluding that this exchange is acceptable because "[d]irect access to the water is preserved under the Act." Pet. App. 38.

Regardless of the majority's semantics, the outcome is clear: the law in Florida has been radically altered because touching the MHWL is no longer a condition precedent to possessing littoral rights.

2. The redefined and changed littoral right to accretion.

For 100 years it has been well-established law in Florida that the littoral right to accretion is a vested present property right. *Sand Key*, 512 So. 2d at 936 ("littoral property rights include the following **vested** rights: . . . (4) the right to receive accretions and relictions to the property."). In *Florida National*, 338 So. 2d at 17,–a case indistinguishable from the instant case–the court held unconstitutional a statute that attempted to permanently fix the boundary between upland and sovereign submerged 'ands (eliminating the Ordinary High Water Line as the boundary) because the fixed boundary took the riparian right to accretion without providing just compensation. *Id.* at 18-19 ("An inflexible meander demarcation line would not comply with the spirit or letter of our Federal or State Constitutions . . . .").[19]

In *Florida National*, the Florida Supreme Court expressly recognized that the littoral right to accretion is a present right to acquire future property by holding "the State, through the Trustees, claims not only the lands to which Plaintiff has already gained title through the operation of accretion and reliction, **but also seeks to deny to Plaintiff the right to acquire additional property in the future through the process of accretion and reliction**." *Id.* at 17 (emphasis

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[19] Ironically, in *Florida National*, the "State concede[d] the invalidity of the boundary-setting provisions" but refuses to do so in this case. 338 So. 2d at 19 (England, J., concurring in part).

added). Not only did the Florida Supreme Court recognize that the littoral right to accretion was a present and a constitutionally protected right under the Florida and U.S. constitutions, it held:

> By requiring the establishment of a fixed boundary line between sovereignty bottom lands and Plaintiff's riparian lands, Fla. Stat. s 253.151 . . . constitutes a taking of Plaintiff's property, **including its riparian rights to future alluvion or accretion**, without compensation in violation to the due process clause of the Fourteenth Amendment of the United States Constitution and the due process clause of . . . the Florida Constitution.

Id. (emphasis added).[20]

In the face of this direct explanation of the nature of the present right to future accretions, the Florida Supreme Court now turns a blind eye and invokes non-existent rules of state substantive law to conclude the right to accretion "is a *contingent, future interest* that only becomes a possessory interest if and when land is added to the upland by accretion or reliction." Pet. App. 20. Notably, the Florida Supreme Court does not and cannot cite a single precedent in Florida law for the proposition that the right to accretion is a "contingent" or "future" right as opposed to a current right to future

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[20] This language is actually part of the trial court's ruling that the Florida Supreme Court quoted with approval.

accretions as it held in *Florida National*, 338 So. 2d at 17.

Having redefined the right to accretion as a "contingent future right," the majority then summarily concludes that it is not "implicated" or "applicable," presumably because accretion will never happen in the future because the State will be under a statutory duty to continually maintain the beach such that erosion or accretion does not occur. This is at odds even with the legislative scheme, which recognized that the present right to accretion was held in such high esteem that it had to be expressly eliminated to carry out its purpose. Fla. Stat. § 161.191(2).

This Court–135 years ago–recognized this right with comparable esteem:

> The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property. The title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase. The right is a natural, not a civil one.

County of St. Clair v. Lovingston, 90 U.S. 46, 68-69 (1874).

The Florida Supreme Court further attempted to justify the redefinition of the right to accretion, stating there is no longer a "need" for the right because the Act statutorily solves the same problem

that the common law doctrine of accretion was created to solve. Again, the majority fails to cite any "background principle of state law" that supports a conclusion that it is permissible to eliminate a constitutionally protected property right if it is no longer "needed."

It is telling that the majority did not expressly overrule its prior century of precedents. Instead, it decided to ignore those precedents and pretend the law has always been something different. As the dissent noted, prior case law is merely "an inconvenient detail of Florida legal precedent" to the majority. Pet. App. 45.

The sole purpose for the majority's creation of this result-oriented law is to allow the State's beach nourishment program to continue without having to pay for property taken. The Florida Supreme Court's decision is nothing short of a sudden, dramatic, and radical change in the law necessary to accomplish its desired policy result, unsupported by any background principle of Florida law.[21]

3. The creation of a counterbalancing constitutional duty to protect the beaches.

In an apparent attempt to create a counterbalance to the constitutional right to compensation when property is taken, the Florida

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[21] *See McCreary County v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 865 (2005) (refusing to accept a governmental statement of purpose when it is "an apparent sham").

Supreme Court creates–from whole cloth–"a constitutional duty to protect Florida's beaches." *Id.* at 16. The Florida Supreme Court does so by citing to the traditional public trust doctrine in the Florida Constitution, which states only that the state owns lands below the MHWL. Fla. Const. art. X, § 11. This provision creates no duty to "protect" beaches (much less private beaches that are landward of the MHWL) and has never before been interpreted to create such a duty.

The Florida Supreme Court also cites to the Florida Constitution as creating "an obligation to conserve and protect Florida's beaches as important natural resources." *Id.* at 16. This section provides:

> It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise and for the conservation and protection of natural resources.

Fla. Const. art. II, § 7(a).

The Florida Supreme Court's sweeping interpretation of this provision is original and no less suspect given the specific references in this section to pollution abatement. Additionally, the Florida Supreme Court does not–and cannot–explain how a non-natural beach nourishment altering the effects of natural processes conserves and protects "natural" resources.

Even if, for the sake of argument only, these two state constitutional provisions create a duty to protect Florida's beaches, neither provision gives the State the right to enter private property to preserve or alter private beaches, much less take private property without due process and compensation.

4. The common law doctrine of avulsion is not applicable to the facts of this case.

The Florida Supreme Court tries to invoke the common law doctrine of avulsion as a "background principle" of state law that justifies the taking of private property in the name of a beach nourishment project. *See Lucas*, 505 U.S. at 1029. The analysis of the doctrine of avulsion, however, misses the mark and undermines the Florida Supreme Court's own conclusion.

As the Florida Supreme Court notes, an avulsive event that causes a retreat of the beach does not change the boundary line and the upland owner does not lose title to the land submerged by the event.[22] Pet. App. 24 (citing *Bryant v. Peppe*, 238 So. 2d 836, 838 (Fla. 1970)). Instead, the upland owner continues to own to the pre-avulsive event MHWL, which would include land that is physically submerged after the event. Pet. App. 24.

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[22] Avulsion is defined as the sudden or perceptible loss or addition to land by natural forces, such as hurricanes. *See Sand Key*, 512 So. 2d at 936 ("by action of the water"); *Siesta Properties, Inc. v. Hart*, 122 So. 2d 218, 224 (Fla. 2d DCA 1960) (by "action of the elements").

The common law allows an owner to "reclaim" its post-event submerged land. Pet. App. 31. The flaw in the Florida Supreme Court's logic is that in such an event, the State does not lose any land because it only owns submerged lands (i.e., those below the pre-event MHWL) and does not own any pre-event dry lands. Thus, only the upland owner has the right under the common law to place sand on the beach out to the pre-avulsive event MHWL and reclaim the dry land lost by the avulsive event. Because no public beaches were in existence when the avulsive events occurred, the Florida Supreme Court's attempt to find sanctuary by holding that "the Act authorizes actions to reclaim public beaches that are also authorized under the common law after an avulsive event" is unavailing, and has no application as a background principle of state law. Pet. App. 40.

C. This Court should expressly recognize the doctrine of "judicial takings."

If a state, through its legislative or executive branches, cannot violate the Fifth Amendment by taking property without paying compensation, why should the judicial branch be allowed to do so? While a majority of this Court has never squarely addressed this question, several historical and recent decisions provide the doctrinal basis for concluding that a decision of state court that violates the Fifth Amendment's Takings Clause should be treated as a taking just as if the act was undertaken by the legislative or executive branch. It follows that this Court should hold that a state court decision

that suddenly and dramatically changes the definition of property under state law, which decision is unpredictable in terms of relevant precedents, is a taking of property subject to the Fifth Amendment's compensation requirements. *See Hughes*, 389 U.S. at 296-97 (Stewart, J. concurring).

1. This Court's prior cases provide the doctrinal foundation for judicial takings.

As early as 1879, this Court recognized that the actions of a state court judge could violate a person's right to equal protection under the Fourteenth Amendment. In *Ex Parte Virginia*, 100 U.S. 339 (1879), an act of Congress made it a misdemeanor for any person selecting jurors to prohibit an otherwise eligible person from serving based solely on race. *Id.* at 344. A state court judge was arrested for violating this act, and challenged its constitutionality. In denying the state judge's petition for writ of habeas corpus, this Court found the act constitutional because it implemented the prohibitions of the Fourteenth Amendment. *Id.* at 349. In so doing, this Court stated:

> We have said the prohibitions of the Fourteenth Amendment are addressed to the States. . . . A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. . . . Whoever, by virtue of public position under a State government, deprives another of **property**, life, or

> liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it.

Id. at 346-47. (emphasis added).

This Court's decision in the equal protection case of *Neal v. Delaware*, 103 U.S. 370, 389-90 (1880),–which cited *Ex Parte Virginia* with approval–held that the state recognizes "an amendment of the Federal Constitution, from the time of its adoption, as binding on . . . every department of its government . . . ." These early cases stand for the proposition that the Equal Protection Clause of the Fourteenth Amendment applies to a state's judicial branch in just as it applies to the state's legislative and executive branches.

Thereafter, in *Scott v. McNeal*, 154 U.S. 34 (1894), this Court held that a judgment of a state probate court violated due process of law when it transferred property of a person believed to be deceased when he was, in fact, alive. This Court stated that the Fourteenth Amendment's due process of law "prohibitions extend to **all acts** of the state, whether through its legislative, its executive, **or its judicial authorities**." *Id.* at 45 (emphasis added); *accord Brinkerhoff-Faris Trust & Savs. Co.*

v. Hill (*Brinkerhoff-Faris*), 281 U.S. 673, 680 (1930) (basing its decision on procedural due process, holding "the federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government").

A few years later this Court, in *Chicago Burlington*, 166 U.S. 226, addressed the applicability of the Fifth Amendment's Taking Clause to the states. This Court has repeatedly recognized this case as applying the Fifth Amendment to the States through the Fourteenth Amendment. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith* (*Webb's*), 449 U.S. 155, 160 (1980); *First English,* 482 U.S. at 310 n.4; *Dolan v. City of Tigard*, 512 U.S. 374, 383-84 (1994); *Palazzolo v. R.I.*, 533 U.S. 606, 617 (2001).

This Court's holding in *Chicago Burlington* certainly seems to apply the Takings Clause to state court actions:

> In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment of the constitution of the United States, and the affirmance of such judgment by the high court of the state is a denial by that state of a right secured to the owner by that instrument.

Chicago Burlington, 166 U.S. at 241.

In 1905, a plurality of this court in *Muhkler v. New York & Harlem Railroad Co.*, 197 U.S. 544 (1905), analyzing a state court's change in property law and divergence from a prior decision under the Contracts Clause of the U.S. Constitution, found the change so unsupported in logic that it had the effect of impairing prior contracts.

In some later cases, Justice Holmes seemed to imply, in dicta or otherwise, that state judiciaries are generally free to change state law without running afoul of the Due Process Clause of the U.S. Constitution. *See Patterson v. Colo.*, 205 U.S. 454, 461 (1907); *O'Neil v. N. Colo. Irrigation Co.*, 242 U.S. 20, 26-27 (1916).[23] "Justice Holmes recognized in *Mahon*, however, that if the protection against the physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by the constitutional limits." *Lucas*, 505 U.S. at 1014 (citing *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 414-16 (1922)).

One conclusion that appears to be settled by this Court is that the "the government does not have unlimited power to redefine property rights." *Loretto*, 458 U.S. at 439. In *Loretto*, this Court rejected an argument that the state statute authorizing a physical occupation of a portion of a building for cable installation created a new property right in the tenant

[23] These cases do not address or discuss the *Chicago Burlington* decision.

such that the occupation was not an unconstitutional taking. *Id.*

In *Loretto,* this Court relied upon its unanimous opinion in *Webb's*, 449 U.S. at 164. In *Webb's*, a Florida statute provided that the interest on monies deposited in an interpleader fund with the clerk of court was income of the clerk. The statute could have been interpreted in manner that only the income on the clerk's fee belonged to the clerk and the interest on the remainder belonged to the successful litigant. *Id.* at 160. The Florida Supreme Court, however, interpreted the statute as providing all income belonged to the clerk and found its interpretation was not a taking under the Florida or U.S. constitutions as the deposited money was "public" not "private" money. *Id.*

Upon review, this Court unanimously held:

> Neither the Florida Legislature by statute, **nor the Florida courts by judicial decree**, may accomplish the result the county seeks simply by recharacterizing the principal as "public money" because it is held temporarily by the court. . . .
>
> To put it another way: a State, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands

> as a shield against the arbitrary use of governmental power.

Id. at 164. (emphasis added).

The proposition that a court cannot redefine property any more than a legislature and avoid the Takings Clause of the U.S. Constitution, most clearly arises from Justice Stewart's concurring opinion in *Hughes*, 389 U.S. 290. In *Hughes*, Justice Stewart noted his fundamental concern with state court rulings that suddenly change state property law, decreeing no property existed only to avoid a taking for which the state must pay compensation. *Id.* at 295-97. After recognizing that a state "is free to make changes, either legislative or judicial, in its general rules of real property law, including the rules governing the property rights of riparian owners," Justice Stewart concluded that a state court cannot take property without just compensation. *Id.* at 295.

Justice Stewart opined that whether a "sudden change in state law, unpredictable in terms of the relevant precedents" could constitute a taking "inevitably presents a federal question" for determination of this Court. *Id.* at 296-97. In determining whether such a sudden change in law has occurred, Justice Stewart stated that "a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." *Id.*

Justice Stewart clearly noted that a state court cannot rely upon such a fiction to evade a constitutional limitation. Accordingly, Justice Stewart–disregarding the state court's majority conclusion that its change in state law was "not startling"–stated, "I can only conclude, as did the dissenting judge below, that the state court's most recent construction of Article 17 [of its constitution] effected an unforeseeable change in Washington property law as expounded by the State Supreme Court." *Id.* at 297.[24]

In finding the Washington Supreme Court's decision to change state property law to be a taking under the Due Process Clause of the Fourteenth Amendment, Justice Stewart eloquently stated the rationale:

> There can be little doubt about the impact of that change upon Mrs. Hughes: The beach she had every reason to regard as hers was declared by the state court to be in the public domain. Of course the court did not conceive of this action as a taking. . . . But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does. Although the State in this case made no attempt to take the accreted lands by

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[24] While this Court typically defers to a state court's decision on matters of state law as final, such is not the case where it is asserted that the state court seeks to evade the U.S. Constitution. *Fox River Paper Co. v. Railroad Comm'n*, 274 U.S. 651, 655 (1927); *O'Neil*, 242 U.S. at 26.

> eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property-without paying for the privilege of doing so. **Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment.**

Hughes, 389 U.S. at 297-298 (emphasis added).

Other members of this Court have expressed grave concerns over a state court's continued use of this property "fiction" to take private property. In the dissent from denial of the petition for writ of certiorari, Justice Scalia stated:

> Just as a State may not deny rights protected under the Federal Constitution through pretextual procedural rulings, neither may it do so by invoking nonexistent rules of state substantive law. Our opinion in *Lucas*, for example, would be a nullity if anything that a state court chooses to denominate "background law"– regardless of whether it is really such– could eliminate property rights.

Stevens, 510 U.S. 1207, 1207 (Scalia, J., and O'Connor, J., dissenting) (citation omitted).

After citing Justice Stewart in *Hughes* and the *Webb's* case with approval, Justice Scalia concluded:

> Since opening private property to public use constitutes a taking, if it cannot fairly be said that an Oregon doctrine of custom deprived Cannon Beach property owners of their rights to exclude others from the dry sand, then the decision now before us has effected an uncompensated taking.
>
> To say that this case raises a serious Fifth Amendment takings issue is an understatement.

Id. (citations omitted).

More recently, Justice Kennedy writing for the Court in *Palazzolo*, 533 U.S. 606, recognized that redefining property rights cannot deprive an owner of such rights. This Court rejected the argument that since property rights are created by the state "by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations," such that subsequent owners acquire a property with lesser rights and have no taking claim. *Id.* at 626.

This Court held that the "State may not put so potent a Hobbesian stick into the Lockean bundle" as it "would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation." *Id.* at 627. Justice Kennedy relied on *Webb's* in concluding that

the "State may not by this means secure a windfall for itself." *Id.*

2. Reasons why this Court should expressly recognize a judicial takings doctrine.

In recognizing a judicial takings doctrine this Court must decide whether it is constitutionally acceptable for a state court to take property by allowing a physical invasion of the property when it is not constitutional for the legislative and executive branch to do so. Stated differently, should this Court "clothe[] [a judge as a state] agent with the power to annul or evade [the U.S. Constitution]?" *Ex Parte Virginia*, 100 U.S. at 347.

Given this Court's steadfast application of other constitutional provisions to the state judiciary (i.e., equal protection, due process, etc.) there are no doctrinal reasons why the Takings Clause should not also apply to the state judiciary. In fact, all doctrinal reasons would support the express application of the Takings Clause to the state judiciary.[25]

First, nothing in the text of the Fifth Amendment suggests that it applies to one branch of government and not others. *See Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 451 (1924) (noting the Contract Clause–which provides "No state shall * * * *pass any* * * * *law*"–is applicable only to the legislative branch (alteration in original)).

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[25] *See generally* Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449 (1990).

Second, the Takings Clause is founded upon basic notions of fairness and justice. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960). Adopting a judicial takings doctrine would: 1) promote fairness and justice as it places prudent limits on state courts regarding dramatic changes in property law; 2) provide some remedy to a property owner who lost an interest that she had every right to believe was hers, through no fault of her own; and 3) prevent a state court (many of which have elected judges) from imposing a great burden on a large class of property owners with a single ruling.[26]

Third, this Court's takings jurisprudence provides no basis for distinguishing between action of a state's court and those of its legislative or executive branches. In *Brinkerhoff-Faris*, 281 U.S. at 679-80 this Court stated:

> If the result above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious. The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid state statute. The federal guaranty of due process extends to state action through its judicial as well as through its legislative,

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[26] J. Nicholas Bunch, Note, *Takings, Judicial Takings, and Patent Law*, 83 Tex. L. Rev. 1747, 1767 (2005).

> executive, or administrative branch of government.

(footnotes and citations omitted); *see also supra* Part I(C)(1).

Fourth, if state courts are free to reorder property rights insulated from the Takings Clause's requirement to pay compensation, then the legislative and executive branches will no longer change the law themselves (and pay for it); rather they will encourage the judiciary to make the change so that the state does not have to pay compensation. Thompson, *Judicial Takings*, 76 Va. L. Rev. at 1507. Professor Thompson provides several examples where state legislatures refused to change property rights but enacted legislation urging the judiciary to do so. *Id.* The courts should not be used by the other two branches of government as a shelter from the Takings Clause's compensation requirement.

Fifth, the stability of property rights is the foundation for a healthy economy. *See* Todd J. Zywicki, *The Rule of Law, Freedom, and Prosperity*, 10 Sup. Ct. Econ. Rev. 1, 22 (2003) ("The documented effect of increasing rule of law values on economic growth is robust. Individuals are more willing to invest in economic growth where property rights are stable . . . ."); *E. Enters. v. Apfel*, 524 U.S. 498, 548 (1998) (Kennedy, J., concurring in judgment) (noting that a drastic retroactive change in the law "can destroy the reasonable certainty and security which are the very objects of property ownership"); *Colo. v. N.M.*, 467 U.S. 310, 316 (1984) (recognizing "society's competing interests in increasing the stability of property rights and in

putting resources to their most efficient uses . . . .").
If property rights are subject to sudden and dramatic changes then they become less stable. This instability injects considerable uncertainty into the financial markets and negatively affects the economy. *See id.*

Most academic objectors to a judicial takings theory suggest state courts need the ability to "adjust the common law to changing circumstances." Thompson, *Judicial Takings*, 76 Va. L. Rev. at 1499. Such an objection ignores that the proposed judicial takings test would only apply to sudden, dramatic, and radical changes to state law, not gradual and minor changes that could be anticipated by prior precedents. One scholar has analogized the common law to a sea anchor:[27]

> "Common law is jurisprudentially bound by precedent, which extends behind us like a giant sea anchor on the end of an ever-lengthening line. Statutory law is changeable only by legislatures who seemingly sail with the winds of popular opinion." Like the sea anchor, background principles do not prevent gradual change, but do keep individual rights from being capsized by

[27] "A 'sea anchor' is a conical-shaped canvas bag that keeps the boat head facing raging seas." Steven J. Eagle, *The 1997 Regulatory Takings Quartet: Retreating from the "Rule of Law"*, 42 N.Y.L. Sch. L. Rev. 345, 399 n.337 (1998).

> squalls of legislative [or judicial] passion.[28]

It is understood that common law systems need flexibility and the proposed test allows that flexibility while simultaneously preventing state courts from circumventing constitutional protections.

Despite suggestions to the contrary, a judicial takings doctrine based on Justice Stewart's test is workable and will not result in a flood of litigation. Lower courts have had little trouble recognizing a sudden and dramatic change in property law. *See Robinson v. Ariyoshi*, 753 F.2d 1468, 1474 (9th Cir. 1985) (holding state supreme court could overrule a century of law governing water rights, but could not divest vested water rights without just compensation), *rev'd on procedural grounds*, 477 U.S. 902 (1986); *Sotomura v. County of Hawaii*, 460 F.Supp. 473, 482-83 (D.C. Haw. 1978) (holding state supreme court's change of seaward property boundary was a radical departure from state law that constituted a taking). Moreover, the proposed ad-hoc test can be applied easily just like other ad-hoc tests this Court has developed. *See, e.g., Penn Cent. Trans. Co. v. City of New York*, 438 U.S. 104 (1978).

One of the last remaining arguments against a judicial takings doctrine is based on federalism. This argument posits that to the extent federal

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[28] *Id.* (citation omitted) (quoting Richard Lowell Nygaard, *Freewill, Determinism, Penology, and the Human Genome: Where's a New Liebniz When We Really Need Him?*, 3 U. Chi. L. Sch. Roundtable 417 (1996)).

courts review a state court's change in property law (which is a state concern), federal courts will be federalizing that law. This argument, however, ignores the fact that this Court and other federal courts constantly review state actions on all types of issues to ensure those actions do not run afoul of the U.S. Constitution. *See Stevens*, 510 U.S. at 1207; *Agins v. City of Tiburon*, 447 U.S. 255, 257 (1980) (executive taking); *Lucas*, 505 U.S. 1003 (legislative taking). There is no reason why there should be a different rule for property rights and the Takings Clause.[29]

This Court should adopt Justice Stewart's judicial takings doctrine to curb state courts from redefining property out of existence in an effort to manipulate this Court's holding in *Lucas* that the "redefined" property rights never existed under "background principles of state law." *See Stevens*, 510 U.S. at 1207 (a "State may not deny rights protected under the Federal Constitution . . . by

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[29] Another unavailing argument made against judicial takings is that a court cannot "take" property because it does not have funds with which to pay compensation. This argument, however, should equally apply to the executive branch, as it does not control the state's purse strings. *See generally* Bunch, *supra* note 26, at 1771. Rather, an act of one state actor makes the state (not any individual branch) liable. *Ex Parte Virginia*, 100 U.S. at 347 (one acting "in the name and for the State, and is clothed with the State's power, his act is that of the State.").

Moreover, to the extent the judiciary desires to change the law in a manner that requires compensation, there are some potential creative ways in which a court could condition such a change. *See* Thompson, *supra* note 25, at 1513 (describing two approaches: "automatic compensation" and "legislative choice").

invoking nonexistent rules of state substantive law."); W. David Saratt, *Judicial Takings and the Course Pursued*, 90 Va. L. Rev. 1487, 1493 (2004) (describing this situation as the "Lucas loophole"). This Court currently holds state courts responsible for violations of equal protection, due process, and other constitutional violations. *See supra* Part I(C)(1). There are no doctrinal reasons that should prevent this Court from expressly extending that practice to the Takings Clause of the Fifth Amendment.

Accordingly, STBR requests that this Court hold that a state court decision which suddenly and dramatically changes what constitutes property under state property law, in a manner that is unpredictable in terms of relevant precedents, is a taking of property subject to the Fifth Amendment's compensation requirements. Further, this Court should hold that the Florida Supreme Court's Opinion below effects a taking in violation of the U.S. Constitution because it suddenly and dramatically changed STBR's members' property in a manner that was unpredictable in terms of relevant precedents.

II. The Florida Supreme Court's Approval of a Scheme That Eliminates Constitutionally Protected Littoral Rights and Replaces Them with Statutory Rights Violates the Due Process Clause of the Fourteenth Amendment and the Takings Clause of the Fifth Amendment of the U.S. Constitution.

This Court's Takings Clause jurisprudence generally falls into two distinct classes: physical and regulatory. *Yee v. City of Escondido*, 503 U.S. 519, 522 (1992). A physical taking is one "where the government authorizes a physical occupation of property (or actually takes title) . . . ." *Id.* A regulatory taking occurs when a government regulation limiting the use of the property "goes too far" as determined by the ad hoc factual inquires described in *Penn Central*, 438 U.S. 104.

In a physical takings case, "the government . . . has a categorical duty to compensate the former owner," *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002), "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner . . . ." *Loretto*, 458 U.S. at 451.

This Court has repeatedly held that a physical invasion of property without the payment of compensation will not be condoned. *See Kaiser Aetna v. U.S.*, 444 U.S. 164 (1979) (the government's imposition of a public right of access to the waters of a private

pond is a physical taking); *Loretto,* 458 U.S. 419 (government appropriation of a small portion of rooftop in order to provide cable TV access for apartment tenants is a physical taking); *U.S. v. Causby,* 328 U.S. 256 (1946) ("Government planes using private airspace to approach a government airport is a physical taking."); *U.S. v. Pewee Coal Co.,* 341 U.S. 114 (1951) (government's seizure and operation of a coal mine to prevent a strike by coal miners constituted a physical taking).

The physical occupation mandated by the Act and approved by the Florida Supreme Court is no different and no less intrusive than any of the above cases. By changing the boundary line and replacing littoral rights with statutory rights, the Act, with the blessing of the Florida Supreme Court, effects a physical taking of STBR's members' property.

The effect of the Act as applied to the rights of STBR's members in this case is not in dispute. Prior to Respondents' application of the Act, STBR's members' title and legal description included ownership of the upland extending to the dynamic MHWL. App. 207, 211. As a result of natural law and over a century of state common law, STBR's members possessed constitutionally protected littoral property rights by virtue of their boundary being the MHWL. *See supra* Parts I(A) & (B)(1)-(2).

The Florida Supreme Court concluded that it is constitutionally permissible for the Act (and itself by redefining property rights) to instantaneously convert what had for a century been oceanfront property, with the full panoply of constitutionally protected littoral rights, into ocean view property

with no common law littoral rights at all. The Act provides:

> Once the erosion control line along any segment of the shoreline has been established . . . , the common law shall no longer operate to increase or decrease the proportions of any upland property lying landward of such line, either by accretion or erosion or any other natural or artificial process, except as provided in s. 161.211(2) and (3).[30]

Fla. Stat. § 161.191(2). Not only is the upland property owner's littoral right to receive accretions specifically eradicated, once the sand is placed seaward of the ECL, the upland property no longer touches the MHWL, so all other littoral rights are lost as well.[31]

The Florida Supreme Court was apparently unconcerned, however, because "the Act expressly preserves the upland owners' rights to access, use, and view, including the rights of ingress and egress. See § 161.201." Pet. App. 26. Far from preserving the upland owner's constitutionally protected littoral rights, Florida Statutes section 161.201 merely

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[30] Florida Statutes sections 161.211 (2) and (3) allow, but do not require, the erosion control line to be vacated under certain very limited circumstances.

[31] In its Final Order, DEP admits that the Act, and its application thereof, eliminates littoral rights. Pet. App. 93-94; *see also supra* note 15.

provides inferior and more limited statutory replacement rights.[32]

The Act's claimed "preservation" of all other littoral rights by granting statutory rights is an oxymoron. Constitutional rights exist as a matter of constitutional law–not statutory law–and are protected by the U.S. Constitution itself. *Cooper v. Aaron*, 358 U.S. 1, 17-19 (1958) (holding constitutional rights cannot be nullified by action of state legislator, executive, or judicial officer). A statute does not and cannot create or eliminate constitutional rights. *Id.*

Of course, a constitutionally protected property right may be taken for a public purpose with the payment of just compensation as allowed by the U.S. Constitution itself. As applied in this case, however, the Act (with the Florida Supreme Court's blessing) takes all littoral rights, gives them to the State, and "replaces" them with inferior statutory rights without paying compensation as contemplated by Florida Statutes section 161.141.

This replacement of littoral rights is a physical taking. All things littoral that STBR's members formally owned was taken from them and given to the Board of Trustees. The Board of Trustees now owns the property landward of the MHWL and is thus the littoral owner with all littoral rights. In exchange, the State (via the Act) gives STBR members a license to use the new public beach just the same as any other public citizen. What the Act fails to give STBR's members is the right to exclude persons from the dry stand beach in front of their homes to the post-

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[32] *See supra* note 11.

nourishment MHWL–a right they once enjoyed, which is "universally held to be a fundamental element of the property right . . . ." *Kaiser Aetna,* 444 U.S. at 179-80.

In fact, once the new public beach is established, commercial vendors can apply for a permit from Walton County to operate "water based activities" from the public beach that include "ocean kayak rentals, water trampolines, climbing walls, inflatable boat rides, personal watercraft rentals, and parasail operations." Walton County, Fla., Land Dev. Code § 22-51.[33] The County also permits a vendor to sell, rent, or solicit "any merchandise, services, goods, or property of any kind or character" on the new public beach so long as they purchase a vendor permit. *Id.* § 22-60.

The pre and post beach nourishment property rights are starkly different. Before the beach nourishment, STBR members owned and controlled the right to exclude all vendors from the beach between their homes and the MHWL. After the beach nourishment, a daily water-based activity park could exist on the new beach between STBR's members homes and the MHWL. Stated simply, STBR's members have lost the right to exclude the general public from the waterfront littoral property for which they paid a premium when they purchased their land.[34]

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[33] The County's Code is published online at www.municode.com.

[34] Land being riparian "is often the most valuable feature" of the property. *Hughes*, 389 U.S. at 293; *accord Thiesen*, 78 So. at 507 ("The fronting of a lot upon a navigable stream or bay often constitutes its chief value and desirability";

Following the Respondents' application of the Act and recording of the ECL, STBR's members' title extends only to the ECL as the property boundary. There is no natural law or common law significance to owning property bordering the ECL.[35] No littoral rights attach thereto.

The changing of the legal description in a deed from the MHWL to the ECL changes the physical extent of the property. Only a court can alter or reform the legal description of property in a deed as it is a private contract.[36] Any attempt to change the description contained in a deed by a state legislature or state executive agency, **without the payment of compensation**, would be prohibited by the Contracts Clause of the U.S. Constitution. U.S. Const. art. 1, § 10 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .").

As noted in *Loretto*, a physical "appropriation is perhaps the most serious form of invasion of an owner's property interests. To borrow a metaphor, the

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further, "riparian rights incident to the ownership of the land were the principal, if not sole, inducement leading to its purchase . . . .").

[35] It should be noted that this case was litigated assuming that the ECL was placed directly on top of the MHWL existing on September 7, 2003. As noted in Part I(B)(4), there may be additional issues concerning whether the September 7, 2003 MHWL survey is correct given the numerous preceding avulsive events. This issue, however, is irrelevant to whether or not the replacement of the MHWL with the ECL, in and of itself, is a taking.

[36] *See, e.g.*, William R. Anson, *Principles of the Law of Contract with a Chapter on the Law of Agency* 82 (Arthur L. Corbin ed., 3d Am. Ed. 1919) ("The only formal contract of English law is the *contract under seal*, sometimes also called a deed . . . .").

government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." *Loretto,* 458 U.S. at 435 (citations omitted). In this case, by converting waterfront (i.e., littoral) property to water view (i.e., non-littoral) property the State has done just that–sliced through every strand of the bundle of property rights previously enjoyed by STBR's members.

"Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.'" *Loretto,* 458 U.S. at 435 (quoting *U.S. v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945)). When a "government permanently occupies physical property, it effectively destroys *each* of these rights." *Id.* (emphasis in original). The U.S. Constitution makes no distinction in the size of property physically taken. *Id.* at 436 ("[C]onstitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied.").

In this case, the Board of Trustees has confiscated the littoral rights associated with the property owned by STBR's members. STBR members have no right to possess land touching the MHWL or littoral rights inherent in such ownership and have been deprived of the right to exclude others from accessing the beach in front of their property down to the MHWL. *Id.* at 435 (noting that "[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights"). The Board of Trustees' occupation of the upland touching the post-nourishment MHWL denies STBR's members' "any power to control the use

of the property" or to make a profit therefrom. *Id.* In addition, STBR's members cannot dispose of or sell what was their property, including upland touching the MHWL and littoral rights, as they no longer possess the same. *Id.*

The Board of Trustees now physically holds what STBR's members once held: littoral property. The conciliatory statutory rights provided by the Act are hardly an equal trade and are simply an attempt by the Board of Trustees to achieve its "desire by a shorter cut than the constitutional way of paying for the change." *Mahon*, 260 U.S. at 416.

Because the Board of Trustees has physically taken and occupies the upland touching the post-nourishment MHWL and its attendant littoral rights, they have a categorical duty to compensate STBR's members for possessing such property.[37] Accordingly, this Court should find the Board of Trustees' action constitutes an uncompensated taking in violation of the Fifth Amendment to the U.S. Constitution, reverse the Florida Supreme Court's Opinion, and remand for further proceedings consistent therewith.

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[37] The Respondents have previously asserted that there is no physical taking but a regulatory taking. In so doing they do not and cannot explain what the regulation is and how it regulates STBR's members' **use** of their property. *See Yee*, 503 U.S. at 522 (a regulatory taking exists when a government's regulation of the property's use goes too far). To the contrary, the Act does not regulate the **use** of any of STBR's members' properties; instead, it replaces and modifies the legal description in STBR's members' deeds by replacing the words "mean high water line" with "erosion control line." Thus, the taking in this case is physical and not regulatory.

III. The Florida Supreme Court's Approval of a Scheme That Allows an Executive Agency to Unilaterally Modify a Private Landowner's Property Boundary Without Notice, a Judicial Hearing, or the Payment of Just Compensation Violates the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution.

The determination of whether procedural due process has been violated is a two-part inquiry. The first inquiry is whether a party has been deprived of a protected property interest. *Am. Mfrs. Mutual Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999). The second inquiry is whether the procedures employed in depriving the party of the protected interest comport with due process. *Id.*

As to the first inquiry, it is undisputed that procedural due process requirements of the Fourteenth Amendment apply to interests in real property. *See Board of Regents v. Roth*, 408 U.S. 564, 571-72 (1972) ("The Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate . . . ."). There is little doubt that owners have a protected property interest in maintaining the boundaries of their real property, especially when one boundary is the MHWL which entitles them to constitutionally protected littoral rights.[38]

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[38] *See supra* note 34.

The ECL survey adopted by the Board of Trustees and recorded in this case, according to the Act, changes the property boundary of STBR members' properties from the MHWL to the ECL. App. 207, 211, 261; Fla. Stat. § 161.191(1).[39] Thus, the Board of Trustees' recordation of the ECL that changes the boundary line of their real property deprives them of a protected property interest.

It is likewise obvious that the procedures employed in depriving landowners of their property interest do not comport with due process. Due process requires that an owner have a meaningful opportunity to be heard prior to being deprived of a property interest. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Fuentes v. Shevin*, 407 U.S. 67 (1972).

This Court described the import of procedural due process in *Fuentes*:

> The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions. . . . [T]he prohibition against the deprivation of property without due process of law reflects the high value, embedded in our

[39] Given this ECL survey covers a 6.9 mile stretch of beach and crosses more than 453 individual properties, it is assumed many other property boundaries were altered by the recording. App. 191-92, 201. One member of Save Our Beaches, Inc., testified that she owned four of these properties that included the MHWL as their boundary. App. 226.

> constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference."

407 U.S. at 80-81 (citing *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972). With limited exceptions, procedural due process requires notice and a meaningful hearing **before** the deprivation. *Id.* at 81 ("If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented.").

The Act's procedures prior to establishing the ECL fall woefully short of meaningful. The Act provides:

> the board of trustees shall give notice of the [ECL] survey and the date on which the board of trustees will hold a public hearing for the purpose of receiving evidence on the merits of the proposed erosion control line . . . of locating and establishing such requested [ECL]. Such notice shall be [made] . . . in order that any persons who have an interest in the location of such requested erosion control line can be present at such hearing to submit their views concerning the precise location of the proposed erosion control line.

Fla. Stat. § 161.161(4).

The Act requires the Board of Trustees to approve or disapprove of an ECL:

> In locating said line, the board of trustees shall be guided by the existing line of mean high water, bearing in mind the requirements of proper engineering in the beach restoration project, the extent to which erosion or avulsion has occurred, and the need to protect existing ownership of as much upland as is reasonably possible.

Fla. Stat. § 161.161(5). Once approved the ECL survey is recorded in the official records of the appropriate county, the result of which changes the boundary line of a property.[40]

The Act's procedural requirements are deficient because the Act:

- Only requires notice of a preliminary public hearing where landowners can "submit their views";
- Only requires the Board of Trustees to "receive" landowners' views regarding the location of the ECL;
- Does not require the Board of Trustees to make a decision at the public hearing; rather the Board of Trustees delegates to an agent the decision of where to locate the ECL;
- Does not require that the littoral landowners be provided with notice of the final adopted ECL; and

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[40] Fla. Stat. § 161.181; App. 49-50, Pet. App. 112; *see generally supra* note 8.

- Does not provide any ability to cross-examine witnesses for the Board of Trustees at the "public hearing" regarding the location of the ECL.

In fact, the members of the Board of Trustees do not even attend such public hearings nor do they even review, approve, or adopt the ECL. App. 49-51, 261. Rather, the Board of Trustees delegates all functions, duties, and requirements to an employee of DEP. *E.g.*, App. 49, 87-90.

The Act's provisions are a perfect example of what due process is not. There is nothing meaningful in the Act's procedures as they only include a requirement to hold a preliminary pro forma hearing to give the public a chance to speak. To be meaningful, the Act must provide a hearing before a judicial officer to approve the State's modification of a landowner's deed and provide compensation.[41] Otherwise, the modification of a deed would violate the Contract Clause.[42]

In *Fuentes,* this Court held that "the Florida . . . prejudgment replevin provisions work a deprivation of property without due process of law

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[41] *Goldberg v. Kelly*, 397 U.S. 254 (1970) (finding that failure to allow the confrontation or cross-examination of witnesses before the decision maker "are fatal the constitutional adequacy of the procedures," and further "It is not enough that a welfare recipient may present his position to the decision maker in writing or second-hand through his caseworker.").

[42] *See generally* Anson, *supra* note 36, at 82; *and* U.S. Const. art. 1, § 10 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ").

insofar as they deny the right to a prior opportunity to be heard before chattels are taken from their possessor." 407 U.S. at 96. In that case, the Florida replevin statute allowed any person "whose goods or chattels are wrongfully detained by any other person" to obtain a writ of replevin to recover them. *Id.* at 73.

In order to obtain a writ of replevin, an applicant only had to allege in "conclusory fashion that he is 'lawfully entitled to the possession' of the property" in a complaint filed in court initiating an action for repossession, post a security bond for twice the value of the property, and prosecute the case without delay. *Id.* at 74. Upon filing of the complaint, the court clerk summarily issues the writ. *Id.* at 74. "There is no requirement that the applicant make a convincing showing before the seizure that the goods are, in fact, 'wrongfully detained.'" *Id.* at 73-74.

The predeprivation procedures and safeguards in *Fuentes*, though not meeting constitutional muster, far exceed the Act's predeprivation procedures. For example, the procedures in *Fuentes*, required a lawsuit to be filed and the involvement of the judicial branch. The Act, however, does not require the involvement of the judicial branch prior to any deprivation. This Court's primary problem with the scheme in *Fuentes* was the lack of a real test by a neutral decision maker prior to the deprivation. 407 U.S. at 83, 96-97. In *Fuentes,* a court clerk reviewing mere allegations in a complaint did not meet due process. *Id.*

The Act in this case provides no meaningful test nor any standard at any point in time. Rather it vests unbridled discretion in a DEP employee–the Board of Trustees' agent–to place the ECL wherever it wants with no notice to landowners of the final location and no review by any third-party prior to recording the survey and changing the property boundary of hundreds of property owners. If the procedures in *Fuentes* are not meaningful and lack due process, the Act's procedures fall even shorter.

If the Act's process meets constitutional muster, there is nothing to stop the State from instituting similarly inadequate procedures and unilaterally modifying property boundaries with no judicial oversight when, for example, it builds highways. This Court has held that a legislature cannot, consistent with procedural due process, take property from one person and vest it in another:

> It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law
> . . . .

Davidson v. New Orleans, 96 U.S. 97, 102 (1877).[43]

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[43] *Accord Wilkinson v. Leland*, 27 U.S. 627, 657-58 (1829) (recognizing legislative transfer of property without landowner's consent always unconstitutional); *Ochoa v. Hernandez y Morales*, 230 U.S. 139, 161 (1913) ("[A]ll

As noted by Amicus Florida Association of Home Builders below, the process of recording two surveys that instantly modify boundaries for up to 453 properties without any judicial approval also raises serious concerns regarding marketability of titles. Pet. App. 221-23. In this case, the deeds of the six members of STBR were altered, not by a judicial decree in which each member was a party, but by a survey recorded by an executive agency. To say that a due process violation has occurred is a serious understatement.

CONCLUSION

The Florida Supreme Court "redefined" STBR's members' 100 year-old property rights so that the State would not be liable for a taking and have to pay compensation. Regardless of the Florida Supreme Court's attempt to characterize its decision otherwise, a taking is measured by what the opinion **does,** not what it "says" or how it attempts to justify the result. *Hughes*, 389 U.S. at 297-98. The Florida Supreme Court's Opinion effects a "sudden change in state law, unpredictable in terms of the relevant precedents" in violation of the Takings Clause.

The U.S. Constitution forbids the State's action in this case. For the reasons stated above, STBR respectfully requests that this Court determine that the establishment of the ECL and the Florida Supreme Court's sudden and dramatic change of Florida property law effects an uncompensated taking in violation of the Fifth and Fourteenth Amendments

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authorities agree that [the term due process] inhibits the taking of one man's property and giving it to another . . . .").

to the U.S. Constitution. Accordingly, this Court should reverse the Florida Supreme Court's Opinion and remand this case for further proceedings consistent therewith.

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RESPONDENT'S BRIEF

(21)

No. 08-1151

In the Supreme Court of the United States

STOP THE BEACH RENOURISHMENT, INC.,
Petitioner,

v.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND, WALTON COUNTY, AND CITY OF DESTIN,
Respondents.

On Writ of Certiorari to the Florida Supreme Court

BRIEF FOR RESPONDENTS WALTON COUNTY AND CITY OF DESTIN

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QUESTIONS PRESENTED

1. Whether any federal question other than the claim that the Florida Supreme Court committed a "judicial taking" under the Takings Clause of the Federal Constitution was pressed or passed on in the Florida Supreme Court, and hence is cognizable under 28 U.S.C. § 1257.

2. Whether the Florida Supreme Court's resolution of questions of Florida property law in this case lacked fair support in prior Florida law.

3. Whether, assuming the Florida Supreme Court's exposition of Florida property law had no fair support, this gave rise to a cause of action under the Takings Clause.

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BRIEF FOR RESPONDENTS WALTON COUNTY AND CITY OF DESTIN

STATEMENT

This case arises out of a state administrative proceeding authorizing restoration of a critically eroded Florida beach. Petitioner argued in the state courts that the Florida statute governing beach restorations, by adopting a fixed boundary line between its members' property and the State's sovereign submerged land, was a taking of certain riparian property rights under Florida constitutional law. The Florida Supreme Court rejected these state law claims, finding that the Florida legislature had good cause to adopt a fixed property boundary as part of a beach restoration project, and that no established riparian property rights had been taken.

Petitioner now seeks to convert this state law dispute into a federal constitutional controversy, by asserting the Florida Supreme Court "radically" and "dramatically" changed the Florida law of riparian rights, thereby perpetrating a "judicial taking." The claim that the Florida court engaged in unprincipled revisionism of state law is unsupportable. But even if the Florida court had changed state property law in a way that lacks fair support in prior Florida law, petitioner can claim no taking under the Federal Constitution. The beach restoration project did not take an inch of its members' land; it provided critical new protections against storm damage; and it expressly preserved all upland owners' rights of view, access, and use of the waters. The Takings Clause protects against *takings* of private property without just compensation; it does not compel the State to transfer to private claimants ownership over a new strip of

beach constructed by the State on state land at taxpayer expense.

A. Public And Private Rights In Tidal Lands In Florida

The State of Florida, like other States, owns as sovereign the land beneath its coastal tide waters. This Court has held that all questions about the boundary between state-owned tidal lands and private uplands, and the respective rights of public and private property owners, are governed by state law. In *Shively* v. *Bowlby*, 152 U.S. 1 (1894), the Court reviewed these issues comprehensively, concluding that "there is no universal and uniform law upon the subject; * * * each state has dealt with the lands under the tide waters within its borders * * * as it considered for the best interests of the public." *Id.* at 26. The modern Court has reaffirmed this understanding. See *Phillips Petroleum Co.* v. *Mississippi*, 484 U.S. 469, 473-476 (1988) (state law controls in determining public trust obligations on tidal lands); *Oregon* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378-381 (1977) (state law controls in resolving title disputes regarding submerged sovereign lands).

In Florida, the landward boundary of state tidal lands has traditionally been the "mean high water line" (MHWL).[1] The State holds title to all land seaward of this line; upland property is variously subject to private or public ownership. Florida's public tidal lands are held by the Board of Trustees of the Internal Improvement Trust Fund, "in trust for all the people." Fla. Const. art X, § 11.

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[1] Florida defines the mean high water line to be the average height of the high tide over a 19-year period. Fla. Stat. §§ 177.27(14), 177.27(15).

As a boundary, the MHWL is inherently unstable or dynamic. It fluctuates over time as alluvial deposits augment the shoreline or the action of the elements erodes it away. Florida, like most legal systems, recognizes a basic distinction between changes in the MHWL that are gradual and imperceptible, and changes that are sudden and perceptible.[2] Gradual and imperceptible augmentations of shoreline are called "accretion," see *Bd. of Trs. of the Internal Improvement Trust Fund* v. *Sand Key Assocs., Ltd.*, 512 So. 2d 934, 936 (Fla. 1987); gradual and imperceptible subtractions are called "erosion." Pet. App. 21. Accretion and erosion cause the location of the MHWL to change. Accretion increases the amount of land belonging to upland owners while erosion reduces it.

An "avulsion" occurs when a sudden and perceptible change causes a "loss of or addition to land by the action of water or a sudden change" in the shoreline. *Sand Key*, 512 So. 2d at 936. Avulsion causes the MHWL to change in fact, but does not result in a change in the legal boundary, which remains where the MHWL was located before the avulsive change occurred. See *Bryant* v. *Peppe*, 238 So. 2d 836, 837-839 (Fla. 1970). In effect, an avulsion transforms a dynamic boundary defined by the MWHL into a fixed boundary defined by the pre-avulsion MHWL.

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[2] "The test as to what is gradual and imperceptible is, that though witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on." *Bd. of Trs. of the Internal Improvement Trust Fund* v. *Medeira Beach Nominee, Inc.*, 272 So. 2d 209, 211 (Fla. Dist. Ct. App. 1973).

The doctrines of accretion, erosion, and avulsion also apply to artificial events caused by the State. Florida law makes clear that the doctrine of accretion does not apply when an upland owner artificially causes additions to her land. *Sand Key*, 512 So. 2d at 938. The State, in contrast, traditionally has been allowed to engage in a variety of construction projects on sovereign submerged lands deemed to be in the public interest. See *Medeira Beach*, 272 So. 2d at 211 (discussing groins built by state along shore in front of private property as "lawful exercise of the police power by a municipality to prevent beach erosion"). When the State causes accretion, the upland owner gains title to the newly formed land as she normally would. See *id.* at 212-214. When the state causes avulsion, however, the boundary becomes fixed at the pre-avulsion MHWL, and the state retains title to any new dry land created seaward of the boundary. *Bryant*, 238 So. 2d at 838-839 (citing *Martin* v. *Busch*, 112 So. 274, 288 (Fla. 1927) (State-caused avulsion resulted in state-owned, new dry land below the original high water mark)).

B. The Beach And Shore Preservation Act

Florida's 825 miles of sandy beaches fronting on the Atlantic Ocean and the Gulf of Mexico have been repeatedly damaged by hurricanes and seasonal storms. The state legislature has declared that "beach erosion is a serious menace to the economy and general welfare of the people of this state and has advanced to emergency proportions." Fla. Stat. § 161.088.

The Beach and Shore Preservation Act, originally enacted in 1965, provides for the protection of Florida's tidal shore lands. The provisions of the Act at issue in this case, which were adopted in substan-

tially their present form in 1970, provide a mechanism for financing and carrying out beach restoration and renourishment projects[3] on beaches that have been designated as critically eroded. (Relevant provisions of the Act are reproduced in Appendix A, *infra*.) The "whole purpose" of beach restoration "is to provide protection to the upland properties" by providing a buffer against future storm damage. J.A. 76. The protected upland properties in this case include 448 parcels occupied by privately-owned homes and condominiums, see J.A. 192, 201, as well as publicly-owned walkovers that allow public access to the beach, public parks, and Scenic U.S. Highway 98, which also serves as a hurricane evacuation route.

Authority to approve a beach restoration project is divided between the Department of Environmental Protection (DEP) and the Board of Trustees. The DEP must examine the environmental impact of the proposed project and approve any dredging of sand from sovereign submerged land. These issues are resolved under a single application that results in the issuance of a Joint Coastal Permit. J.A. 143. The Board is required to determine and record a boundary line, called the Erosion Control Line (ECL), between the state sovereign lands and upland properties in the area where the restoration will occur. Fla. Stat. § 161.141.

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[3] The Act defines "beach restoration" to mean "the placement of sand on an eroded beach for the purposes of restoring it as a recreational beach and providing storm protection for upland properties," Fla. Stat. § 161.021(4), and "beach nourishment" to mean "the maintenance of a restored beach by the replacement of sand." *Id.* § 161.021(3). The project challenged in this case was a beach restoration (J.A. 99), and we will generally refer to it as such.

The Act declares "that there is no intention on the part of the state to extend its claims to lands not already held by it or to deprive any upland or submerged owner of the legitimate and constitutional use and enjoyment of his or her property." *Ibid.* Accordingly, the Act directs the Board in locating the ECL to "be guided by the existing line of mean high water." *Id.* § 161.161(5). Where the project requires a taking of private property, for example if the ECL must be located upland from the existing MHWL, the statute directs the requesting authority to acquire the needed property by eminent domain. *Id.* § 161.141.

The survey undertaken by the Board establishes not only the ECL but also other dimensions of the project, including the width of the restored beach, dune elevation, and beach profile. *Id.* §§ 161.161(3), 161.161(1)(c). Once the survey is completed, notice of the survey is provided by publication and by mailing copies to each riparian owner of record of upland property lying within 1000 feet of the proposed beach restoration. After a public hearing, the Board may adopt a resolution approving the survey and the ECL. *Id.* § 161.161(4), (5). Once any judicial challenges are resolved, the survey is recorded. *Id.* § 161.181.

The reason for adopting a fixed boundary line and recording the survey is that the Act establishes a series of public commitments defined in relation to the ECL and the survey. Cumulatively, these commitments provide significant benefits to upland property owners. If substantial erosion occurs upland of the ECL, the Board, acting either on its own or on petition by upland owners, can direct the responsible agency to restore the beach "to the extent provided

for in the board of trustees' recorded survey." Fla. Stat. § 161.211(3). The State may not extend the portion of the beach lying seaward of the ECL "beyond the limits set forth in the survey," unless the State obtains the written consent of all upland owners "whose view or access to the water's edge would be altered or impaired." *Id.* § 161.191(2). The State may not allow any structure, other than one designed to prevent erosion, "to be erected upon lands created, either naturally or artificially, seaward of any" ECL fixed by survey. *Id.* § 161.201. It may not permit any use of the reconstructed beach which may be "injurious to the person, business, or property of the upland owner or lessee." *Ibid.* Finally, if for any reason the State fails to commence a beach restoration project within two years of the recording of the ECL, or suspends a restoration project for more than six months once it has started, upland owners abutting a majority of the ECL can petition the Board to cancel it and restore the common law boundary—the MHWL. *Id.* § 161.211(1).

In addition to these very substantial public commitments, the Act contains an express "[p]reservation of common-law rights." Fla Stat. § 161.201. Any upland owner or lessee who ceases to own to the MHWL, because of the substitution of the ECL for the MHWL, nevertheless continues to be entitled to common law riparian rights, "including but not limited to rights of ingress, egress, view, boating, bathing, and fishing." *Ibid.* The only exception is that "the common law shall no longer operate to increase or decrease the proportions of any upland property lying landward" of the ECL, "either by accretion or erosion or by any other natural or artificial process." *Id.* § 161.191. The suspension of future increases or decreases in upland property is logically entailed by

the creation of a fixed boundary line between sovereign lands and uplands. This is confirmed by an exception to the exception: If the agency responsible for the reconstructed beach allows the shoreline to recede to a point landward of the ECL, then the common law of accretion and erosion is restored. *Id.* § 161.211(2).

The Act provides for public funding of beach restoration and renourishment projects. For beaches that have been determined to be critically eroded, the State is authorized to pay up to 75 percent of the cost of the project; the balance is paid through cost sharing by the local government sponsor and sometimes with funds from the federal government. Fla. Stat. § 161.101(1)-(5). Although local governments may collect special assessments from littoral property owners to defray a portion of the costs, no such assessment was imposed in this case.

Since it was adopted, the Act has been used on 45 separate projects to restore approximately 175 miles of Florida beaches. J.A. 82.

C. Proceedings Below

The Destin/Walton County Beach, located in the western Panhandle of Florida, is one of the finest white sand beaches in the State. J.A. 132. The beach was critically eroded by Hurricane Opal in 1995. J.A. 30. Walton County and the City of Destin, respondents herein, entered into a series of conferences with the Department about how to address the problem. On July 30, 2003, respondents applied for a Joint Coastal Permit to undertake a beach restoration project under Act.

The proposed project covered 6.9 miles of beach, located partially in Walton County and partially in

the City of Destin (which is in Okaloosa County). Sand for the restoration project was to be taken from a borrow area located offshore. The sand would be disturbed by a cutter dredge, vacuumed into a pipeline for delivery to the restoration area, after which it would be spread out by bulldozer. J.A. 108-110.

The restored beach was designed to have greater width and higher elevation than the pre-storm beach. J.A. 28-29. The project also called for dune restoration on property upland from the ECL. J.A. 218-219. Upland filling would be accomplished by obtaining construction easements from consenting upland owners. J.A. 173-174, 192. Testimony at the administrative hearing explained that the purpose of enlarging the beach during the restoration process was to prevent future anticipated erosion. J.A. 80-82. The extra sand was described as "sacrificial sand," which has a life expectancy of "six to eight years." J.A. 81. After the beach erodes back to the "storm protection" design, beach renourishment will be used to maintain it in that state. J.A. 81. One witness acknowledged that because the restored beach would be wider and higher than the pre-storm beach, it would cause the MHWL to shift seaward relative to the pre-storm MHWL. J.A. 89. Thus, the project, at least initially, would create a new strip of dry sand beach between the ECL and the new MHWL. J.A. 179, 223.

On July 15, 2004, the DEP issued its Notice of Intent to award the Joint Coastal Permit. J.A. 27-41. Petitioner Stop the Beach Renourishment (petitioner or STBR), an association of six property owners owning five parcels of littoral land, along with a second group, Save our Beaches, Inc. (SOB), filed a Petition for Formal Administrative Proceedings, challenging

the Department's Notice. The petition set forth 38 "issues of ultimate fact" which STBR and SOB alleged were in dispute, most of which concerned environmental impacts. Subsequently, STBR filed a petition challenging the Walton County ECL. Among petitioner's claims was that "the Department has not properly identified the location of the mean high water line on the Destin/Walton County Beach." J.A. 20. The petitions were consolidated for adjudication in a single proceeding before an Administrative Law Judge (ALJ).

During September and October 2004, more hurricanes hit Florida, including Hurricane Ivan, which caused further damage to the Destin/Walton County Beach. Pet. App. 4 n.4. In light of this development, STBR and SOB agreed to "abandon their challenge to the beach-related technical aspects" of the draft permit and the Walton County ECL. J.A. 53. Included among the abandoned claims were all challenges to the location of the ECL. The amended petition was pared down to four issues: whether the project complied with water quality standards, whether Destin and Walton County had established the requisite upland interest necessary to obtain a permit, and two questions about whether the project would take constitutionally protected riparian rights. J.A. 61.

In late 2004, while the administrative proceedings were still pending, petitioner and several private property owners filed a lawsuit in the Florida Circuit Court in Leon County, seeking a declaratory judgment that the Florida Beach and Shore Preservation Act is unconstitutional under the Takings and Due Process Clauses of both the Florida and the Federal Constitutions. (The amended complaint is

reproduced in Appendix B, *infra*.) When respondents brought this action to the attention of the ALJ, STBR and SOB conceded that the agency had no authority to decide the constitutional issues. The ALJ accordingly dismissed the constitutional claims from the administrative proceeding.

At this point, only the two nonconstitutional claims remained for administrative determination. An oral hearing on these issues was held on June 7, 2005. See J.A. 64-251. On June 30, 2005, the ALJ issued a Recommended Order approving the project. Pet. App. 101-135. The ALJ determined that respondents did not have to show upland interest, because under the applicable administrative rules, a public entity need show only that the project does not "unreasonably infringe on riparian rights." Pet. App. 122-123, quoting Fla. Admin. Code Rule 18-21.004(3). The ALJ found that the project would not unreasonably infringe on any of petitioner's members' riparian rights. The Secretary of the DEP adopted the ALJ's proposed order and findings, including the determination that no riparian rights would be unreasonably infringed. Pet. App. 88-100.

Motions to stay the DEP's Final Order granting the permits were denied by the DEP and the Florida District Court of Appeals (J.A. 274), and respondents commenced the beach restoration project.

When STBR and SOB appealed the administrative order to the District Court of Appeals, they abandoned any challenge to the permit on environmental or statutory grounds. Instead, relying on Florida authority allowing constitutional challenges to administrative action to be brought on judicial review, see *Key Haven Associated Enterps., Inc.* v. *Bd. of Trs. of the Internal Improvement Trust Fund*, 427

So. 2d 153, 156-158 (Fla. 1983), the only argument STBR and SOB advanced on the merits was that the beach restoration project was a taking of riparian rights under Florida constitutional law.[4] STBR and SOB explained that this was an "as-applied" constitutional challenge, in contrast to the challenge then pending before the Circuit Court in Leon County, which they characterized as a "facial" challenge to the Act.

The District Court of Appeals, in a decision filed April 28, 2006, agreed that the Act was unconstitutional as applied to petitioner's members. Pet App. 61-87. Citing only Florida authorities, the court found that riparian rights are property rights which cannot be taken without compensation; that these rights include the right to receive accretions and have property's contact with the water remain intact; and that these rights "were eliminated by the Department's final order." Pet. App. 80. The court also expressed doubt as to whether the Florida legislature had the authority to define the boundary between uplands and sovereign land with a fixed ECL as opposed to a dynamic MHWL. Pet. App. 83-85.

The court accordingly reversed the DEP's order approving the Joint Coastal Permit; remanded to the DEP with instructions to "provide satisfactory evidence of sufficient upland interest"; and declared "invalid" the Board of Trustees' recorded survey to the extent it showed "a boundary of STBR's members' property that is different from their deeds." Pet.

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[4] Another issue was whether STBR and SOB had satisfied Florida associational standing requirements. Pet. App. 73. The court upheld STBR's standing, but denied standing to SOB. *Id.* at 75. SOB thereafter dropped out of the litigation.

App. 86-87. The court observed that Fla. Stat. § 161.141 calls for the exercise of eminent domain when a project "cannot reasonably be accomplished without the taking of private property," but it acknowledged that "whether an eminent domain proceeding will be required or what property would be subject to the proceeding" were issues "not before us in this case." Pet. App. 86 & n.7.

In the meantime, the Circuit Court for Leon County issued an opinion and order on July 20, 2005. Finding that genuine issues of material fact remained unresolved, the trial judge ruled that neither side was entitled to summary judgment. In 2007, the court ordered that case held in abeyance pending further order.

Although the District Court of Appeals declared the Joint Coastal Permit and the ECL invalid, the court agreed to stay its mandate and certified its decision as one of great public importance warranting further review by the Florida Supreme Court. Construction activity on the Destin/Walton County Beach restoration project therefore continued. The Walton County portion of the project was completed on January 19, 2007; the Destin portion was completed on June 24, 2007.[5]

The Florida Supreme Court took jurisdiction of the case, and in an opinion released on September

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[5] Although the completion of the project presumably moots any challenge to the issuance of the permits, petitioner's judicial takings claim is not moot. If petitioner prevails on all its claims, petitioner's members, if they can prove in a separate proceeding that the loss in value of their property exceeds the benefits they obtain from the project, see pp. 52-53 *infra*, would be entitled to an award of just compensation.

29, 2008, quashed the decision of the District Court of Appeals. The court began by rephrasing the certified question, noting that although the District Court of Appeals had described the question as an as-applied challenge, it had "actually addressed a facial challenge." Pet. App. 2. After reviewing various features of common law riparian rights, the court described the ways in which the Florida Act modified the common law, while seeking to preserve the same "careful balance between the interests of the public and the interests of the private upland owners." Pet. App. 26.

The Florida Supreme Court next turned to the specific constitutional objections identified by the District Court of Appeals. With respect to accretion, the court noted that future accretion is a "contingent right," adopted as a "rule of convenience intended to balance public and private interests by automatically allocating small amounts of gradually accreted lands to the upland owner without resort to legal proceedings and without disturbing the upland owner's rights to access to and use of the water." Pet. App. 34. This rationale, the court explained, and the other purposes of the doctrine of accretion identified in prior Florida cases, did not apply in the context of a beach restoration project under the Act, because the Act substituted a fixed boundary for the fluctuating boundary defined by accretion and erosion.

With respect to the right of an upland owner to maintain contact with the water, the court observed that previous decisions had recognized the right of access to the water, but no decision had enforced a right of contact with the water independent of a right of access. Because the Act expressly preserved the right of access to the water, the Act was not facially

unconstitutional for permitting beach restorations that would temporarily insert a new increment of dry sand beach between upland property and the water, thereby eliminating physical contact with the water.

Throughout its discussion of the alleged constitutional infirmities of the Act, the Florida Supreme Court made no reference to the Federal Constitution or to any decision of this or any other court construing the Takings Clause of the Federal Constitution. Only Florida constitutional decisions were cited.

Justices Wells and Lewis separately dissented. Neither dissenting opinion cited any provision of federal law or any federal judicial decision.

Petitioner filed a Motion for Rehearing, Pet. App. 138-170, in which for the first time it advanced a federal constitutional claim: that the Florida Supreme Court had "dramatically chang[ed]" Florida law, resulting in an "uncompensated taking of private property contrary to the United States Constitution." Pet. App. 139. The motion was denied without opinion.

SUMMARY OF ARGUMENT

Petitioner's brief is directed in significant part to issues that are not properly before the Court. Only one federal constitutional claim was even pressed by petitioner in the state courts below: the eleventh-hour argument that the Florida Supreme Court "radically" and "dramatically" changed Florida property law, and in so doing perpetrated a "judicial taking." This novel claim, which has never before been accepted by the Court, should be rejected for several reasons.

A. This Court's jurisdiction over state court judgments under 28 U.S.C. § 1257 extends only to federal

federal questions pressed or passed on below. This case was decided by the Florida courts as a matter of Florida constitutional law. Petitioner turned to the Federal Constitution only after its state-law claims had been rejected by the Florida Supreme Court, filing a petition for rehearing claiming that the Florida court had committed a judicial taking. In these circumstances, the only federal question presented for this Court's review is the judicial taking claim. Petitioner's claims that the Florida Act violates procedural due process and commits a federal taking could have been, but were not, pressed by petitioner below, and were not passed on by the Florida courts. These claims should be dismissed.

B. This Court has never recognized a judicial taking claim. Two elements are minimally necessary. First, it must be shown that the court below interpreted state property law in a way that lacks any fair support in previous law. In effect, this Court must be able to say that the state court decision was so unreasonable the Court must ignore it, and substitute its own understanding of state law, in order to protect federal constitutional rights. Second, it must be shown that the change in state law wrought by the state court, measured against the correct understanding of state law, has such a severe impact on property rights that it constitutes a taking under federal takings jurisprudence. Petitioner cannot satisfy either of these required elements.

Great deference should be accorded state courts in the interpretation of their own law. State courts have a particular advantage in explicating their own property law, especially in the area of riparian rights, which often differ from State to State. If such determinations could be readily challenged as judi-

cial takings, this could stifle needed adjustments in property law over time. It is also unclear whether judicial takings claims could be reviewed anywhere except in this Court. Such review would occur without any framing of the issues below and usually, as here, on an inadequate record.

C. The Florida Supreme Court had more than ample support for its resolution of the property issues in this case. No previous Florida decision had considered whether the Florida legislature, in the context of a beach restoration program, could suspend future accretion and erosion. The Florida court reasonably concluded that this was permissible, given that the substitution of a fixed boundary for the dynamic boundary of the common law rendered accretion and erosion irrelevant. The court also reasonably concluded that no prior Florida decision had recognized a right to physical contact with the water, independent of a right of access to the water, which the Florida Act expressly preserves.

Petitioner's ultimate objective is to maintain the fluctuating MHWL as a boundary for its members' property, which petitioner believes would allow its members to claim the new dry-sand beach between the ECL and the post-restoration MHWL as their own property. This claim is contrary to the common law. The beach restoration was not an accretion; it was an artificial avulsion (and a response to natural avulsion), and hence the project under the common law would have followed the Act in freezing the boundary at the pre-storm MHWL. Petitioner also cannot show that the fluctuating boundary of the common law was ever regarded as a right rather than a convention adopted out of necessity, which the Act eliminates by fixing the boundary and pro-

viding significant commitments that the State will prevent future erosion.

D. Even if petitioner could show that the Florida Supreme Court changed state property law without fair support, the changes in law allegedly produced would not qualify as a taking under federal constitutional law. STBR, the "sole petitioner," owns no property and has never sought any compensation in this case, two required elements for any takings claim. Hence petitioner has no cause of action under the Takings Clause.

Assuming a takings claim is properly presented, petitioner cannot show that the Florida Supreme Court decision has resulted in any invasion of its members' land or diminution of their rights. Petitioner did not challenge the location of the ECL in the administrative proceedings, and so the new boundary of petitioner's members' land must be assumed to be located exactly where the pre-existing MHWL was located. Consequently, the state has not invaded or carved off a single inch of their land. The relevant takings inquiry requires a comparison between the whole parcel owned by petitioner's members before the project and the Florida decision with what they had afterwards. Petitioner's members cannot by sleight of hand claim that the new dry sand beach between the ECL and the post-project MHWL is "their" property which has been taken, since this new beach did not previously exist, and was only created because of the very government project petitioner challenges.

Since no physical invasion or appropriation of land occurred, under relevant federal takings authority any loss of future accretion rights, or of the asserted right to touch the water, must be regarded as

noncompensable consequential damages. Moreover, the Florida Act requires consideration of offsetting benefits in any action for a taking arising out of a beach restoration project. The benefits petitioner's members received—in terms of protection from future erosion and storm damage, as well as preservation of rights and other protections of their interests—far exceed any speculative losses associated with the adoption of a fixed boundary. For these reasons as well, there was as a matter of law no taking.

ARGUMENT

I. NO FEDERAL QUESTION OTHER THAN THE JUDICIAL TAKINGS CLAIM IS PROPERLY PRESENTED.

Review of state court judgments by this Court under 28 U.S.C. § 1257 extends only to federal questions actually decided by the court below. See *Murdock* v. *City of Memphis*, 87 U.S. (20 Wall.) 590, 636 (1874). With rare exceptions, the Court has refused to "consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams* v. *Robertson*, 520 U.S. 83, 86 (1997); see also *Illinois* v. *Gates*, 462 U.S. 213, 217-224 (1983). Under this rule, only one federal question is presented in this case: petitioner's contention that the Florida Supreme Court made an unsupported change in Florida law and in so doing committed a taking of petitioner's members' property under the Federal Constitution.

A. No Procedural Due Process Claim Was Pressed Or Passed On Below

In Part III of its brief, petitioner presents an elaborate argument to the effect that the Florida Act

violates procedural due process because it allows an executive agency to modify a landowner's property boundary without a judicial hearing. Pet. Br. 59-66. This argument is newly minted and was neither presented to nor decided by the Florida courts below.[6]

This is not one of those rare cases in which a state court unexpectedly changes state law in a way that creates a procedural due process violation, for example, by denying a claimant notice or "a meaningful opportunity to be heard." *Boddie* v. *Connecticut*, 401 U.S. 371, 377 (1971); *cf. Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673 (1930). Petitioner does not identify any change in state law wrought by the Florida Supreme Court that might have violated due process. Petitioner's sole claim is that *the Act* violates procedural due process by allowing an executive agency to survey and fix real property boundaries without a prior judicial hearing. See, *e.g.*, Pet. Br. 61-63.

The Act has been on the books since 1970 and was in effect when the Board established the ECL at issue. Had petitioner thought the Act created a due process violation, it could have urged this upon the state courts in this case. This would have given those courts an opportunity to construe the relevant provisions of the Act and evaluate any due process problem. This Court should not serve as the court of first

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[6] Petitioner included a due process claim as one of the questions presented in its certiorari petition, but the short discussion was ambiguous as to whether it was challenging the Act or the decision of the Florida Supreme Court. Pet. 36-39. Now that it is clear that petitioner is challenging *the Act*, it is obvious that petitioner has failed to comply with this Court's Rule 14.1(g)(i) by specifying when this question was raised and passed on in the courts below. See *Adams*, 520 U.S. at 89 n.3.

impression in considering petitioner's procedural due process claim, and it should be dismissed.[7]

B. No Conventional Federal Takings Claim Was Pressed Or Passed On Below

Nor is any federal takings challenge to legislative or executive action presented by this case. Neither the Florida Supreme Court nor the Florida District Court of Appeals made any reference to the Federal

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[7] Petitioner also lacks standing to object to the Act's procedures for setting property boundaries. Petitioner filed a petition for formal administrative proceedings challenging the Board's survey, but it abandoned any claim regarding the location of the ECL before the hearing commenced. See p. 10, *supra*. Petitioner has no standing to object to the procedures governing a claim it has waived.

In any event, petitioner's due process claim fails on the merits. The Act provides for individualized notice and a public hearing on the proposed ECL and the survey. Fla. Stat. § 161.161(4). The Act also contemplates that the Board's resolution adopting the ECL and the survey may be challenged by a petition for formal administrative proceedings under the Florida APA, Fla. Stat. § 120.50 *et. seq.* See Fla. Stat. § 161.181. (The Act originally made this explicit, in Section 161.171, but this section was repealed in 1978 as being redundant with the APA. See Fla. Laws, 1978, c. 78-95.) An administrative hearing on the petition would be a full adjudicatory-type proceeding before an ALJ, allowing for consideration of individualized objections. Fla. Stat. § 120.569. Any final administrative decision is subject to review by the Florida District Court of Appeals. Fla. Stat. § 120.68. The Board's resolution approving the project and the ECL cannot be publicly recorded until such review has been completed, Fla. Stat. § 161.181, and title to land seaward and landward of the ECL does not vest until the ECL is recorded. Fla. Stat. § 161.191(1). Consequently, the statute provides a full and adequate opportunity for individualized objections, subject to judicial review, before the boundaries to individual parcels of littoral land are modified (if at all) by the ECL.

Takings Clause. Neither court framed the takings inquiry in terms of the constitutional doctrine this Court has prescribed for assessing such claims. Indeed, neither court cited a *single* decision of this Court resolving a takings claim under either the Fifth or Fourteenth Amendments. Both courts relied exclusively on Florida judicial decisions in resolving the takings issue.[8] Unquestionably, neither lower court passed on a federal takings claim below.[9]

This Court has observed, "When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, and the aggrieved party bears the burden of defeating this assumption[.]" *Adams*, 520 U.S. at 86-87 (citations omitted). Petitioner has not and cannot overcome this presumption. Petitioner does not specify, as required by this Court's Rule 14.1(g)(i), how it pressed a federal takings challenge to either the Act or the project in the courts below. The petition for rehearing with the Florida Supreme Court included one sentence, in a footnote, asserting that the Act violates the United States Constitution. Pet. App. 141 n.2. However, this Court will generally not consider a question raised for the first time in a petition for rehearing, when the issue is one that could have been raised at an earlier stage in the litigation and the state court denies the petition without comment.

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[8] The Florida Constitution contains a takings clause, Fla. Const. art. X, § 6, which is similar, albeit not identical, to the Federal Takings Clause.

[9] This is not a case where, under *Michigan* v. *Long*, 463 U.S. 1032 (1983), a lower court relies on state law "interwoven" with federal law. *Id.* at 1040-1041. There is no reference to federal law *at all* in the opinions below with respect to the takings issue.

See *Adams*; *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 128 (1945). Petitioner also reproduces an *amicus curiae* brief filed by the Pacific Legal Foundation in the Florida Supreme Court, which urged that the Act violates the Federal Takings Clause. Pet. App. 181-209. Under Florida law, however, it is "axiomatic" that *amici* are not permitted to raise issues not presented by the parties. See *Reichmann* v. *State*, 966 So. 2d 298, 304 n.8 (Fla. 2007).

Tellingly, petitioner does not include excerpts from *its* briefs below. Petitioner's brief in the District Court of Appeal made no reference to the Federal Takings Clause and cited no federal takings cases. In the Florida Supreme Court, petitioner's brief contained only two references to federal takings law, in both contexts urging the court that it was *not necessary* to consider federal authority.[10] See Respondent's Amended Answer Brief at *18, *22, 2004 WL 5482213 (Fla. Nov. 29, 2006).

In an effort to circumvent its failure to challenge state legislative or executive action under federal law below, petitioner seeks in Part II of its brief to assimilate such a challenge to its judicial takings theory. Specifically, petitioner maintains that a federal

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[10] Respondents unsuccessfully urged the Florida courts to consider federal precedents, such as *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978), in order to *reject* the takings claim. See Appellants' Initial Brief on the Merits at *15-*22, 2006 WL 3074093 (Fla. Oct. 20, 2006). In passing on petitioner's state law claims, the Florida Supreme Court obviously was not required to adopt this federal authority as a state rule of decision. Where respondents refer to federal authority in state court, but petitioner presents no federal question, it is "perfectly reasonable" for a state court to conclude that the federal claim was not before it. *Adams*, 520 U.S. at 89.

question is presented because the Florida Supreme Court *failed to invalidate* legislative and executive action as a matter of state law. Thus, petitioner complains that "[b]y changing the boundary line and replacing littoral rights with statutory rights, *the Act*, with the blessing of the Florida Supreme Court, effects a physical taking of STBR's members' property," Pet. Br. 52 (emphasis added), and, "*the Act* (with the Florida Supreme Court's blessing) takes all littoral rights, gives them to the State, and 'replaces' them with inferior statutory rights without paying compensation as contemplated by Florida Statutes section 161.141." Pet. Br. 54 (emphasis added). As should be obvious, petitioner cannot convert a *state* constitutional challenge into a *federal* constitutional challenge by the device of adding that the state violation had the state court's "blessing." If this is sufficient to create a federal question, then every allegedly erroneous state court ruling on a state law question could come to the Court as a federal constitutional question.

C. The Judicial Takings Claim

The only federal question that can be said to have been either pressed or passed on below is the judicial takings claim. Petitioner filed a petition for rehearing with the Florida Supreme Court arguing that the court had violated federal constitutional law by rendering an "unforeseeable change in Florida law," citing in support Justice Stewart's concurring opinion in *Hughes* v. *Washington*, 389 U.S. 290, 298 (1967). Pet. App. 148. Rehearing was denied without opinion. Assuming the Florida Supreme Court did commit a judicial taking, then "[t]he additional federal claim thus made was timely, since it was raised

at the first opportunity." *Brinkerhoff-Faris*, 281 U.S. at 678.

We caution, however, that this is the *only* federal question even plausibly presented in this case. Petitioner can contest as a violation of the Federal Constitution only those alleged impairments of its property rights attributable to an unsupported change in Florida law by the Florida Supreme Court. This narrow point of jurisdiction cannot be used as a bridgehead to introduce other constitutional challenges that were neither pressed nor passed on below.

II. STATE COURT INTERPRETATIONS OF STATE LAW PRESENT NO POSSIBILITY OF A JUDICIAL TAKINGS CLAIM IF THEY HAVE FAIR SUPPORT IN EXISTING STATE LAW.

This Court has never recognized a "judicial takings" claim. The Court has held that an unanticipated interpretation of state law by a state court can give rise to a due process violation. See, *e.g.*, *Bouie* v. *City of Columbia*, 378 U.S. 347, 354-355 (1964); *Brinkerhoff-Faris*, *supra*; *cf. Rogers* v. *Tennessee*, 532 U.S. 451 (2001). But as explained in Part I.A, petitioner does not allege that the Florida Supreme Court's decision created a due process violation; it alleges only that *the Act* violates due process, an issue not pressed or passed on below.

Although there may be extreme circumstances in which it would be appropriate to recognize a judicial takings claim, such cases will be quite rare, and it is certain that nothing in this case would sustain such a claim. Petitioner's brief is elusive about what constitutes a judicial takings claim. At a minimum, we believe, it would have to include two elements. First,

it would be necessary to show that the state court very badly misinterpreted state property law—so badly that a federal court is forced to substitute its own interpretation for that of the state court in order to protect federal constitutional rights. Second, it would be necessary to show that the change in state law produced by the state court decision had such a severe impact on the claimant that it constitutes a taking under the Federal Takings Clause. We address the first requirement—the need to show a very bad misinterpretation of state law—in Parts II and III of this brief. We consider the second requirement—that any change be severe enough to constitute a taking under federal constitutional law—in Part IV.

A. Federal Court Review Of State Court Determinations Of State Law

In a variety of contexts, the protection of federal constitutional rights may require inquiry into the content of state law. See generally H. Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 Colum. L. Rev. 1919 (2003). Perhaps most familiar is the question whether failure to comply with state procedural rules bars consideration of a federal constitutional claim, either on direct or collateral review. See, *e.g.*, *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *NAACP* v. *Alabama*, 357 U.S. 449 (1958).

More germane to the judicial takings claim are situations in which federal constitutional guarantees apply to entitlements, the existence and dimensions of which are governed by state law. Included here are the Contracts Clause, which prohibits the States from passing any law "impairing the Obligation of Contracts," U.S. Const. Art. I, § 10; the Due Process

Clauses, which forbid the government from depriving persons of "property" without "due process of law," U.S. Const. Amends. V & XIV; and the Takings Clause, which states "nor shall private property be taken for public use without just compensation." U.S. Const. Amend. V. Under these clauses, "independent source[s] such as state law" determine whether particular entitlements have been created and what incidents and obligations attach to them. *Bd. of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). Federal constitutional law then determines whether the entitlements recognized by state law should be characterized as "contracts" or "property" for purposes of federal constitutional analysis. See, *e.g.*, *Gen. Motors Corp.* v. *Romein*, 503 U.S. 181, 187 (1992) (Contracts Clause); *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 757 (2005) (procedural due process); *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 164-165 (1980) (Takings Clause); Monaghan, 103 Colum. L. Rev. at 1935-1947.

No issue is presented in this case as to whether the entitlements petitioner alleges its members lost because of the Florida Supreme Court decision should be characterized as "property" for federal constitutional law purposes. See pp. 45-46 & note 14, *infra*. The question, rather, is whether these entitlements once existed as a matter of Florida law and were improperly taken away by the Florida Supreme Court's decision. On *that* question—whether particular entitlements exist under state law—state court judgments warrant the greatest deference.

There are several reasons why opening the door to federal court review of state interpretations of state property law would be undesirable. First, state courts are much more likely to be familiar with state

property law than are federal courts. Wide variations exist among the States in their understanding of property rights associated with riparian lands. See *Port of Seattle* v. *Or. & Wash. R.R.*, 255 U.S. 56, 64 (1921); *Shively* v. *Bowlby*, 152 U.S. at 17-40. State courts will be more attuned to these differences, and have a comparative advantage relative to federal courts in explicating their own property systems.

Second, some flexibility is desirable in interpreting state property law. Property rights systems are not static, but undergo a process of adjustment and refinement over time. See H. Demsetz, *Toward a Theory of Property Rights*, 57 Am. Econ. Rev. 347 (1967). State courts play a critical role in recognizing and defining the dimensions of property rights. If every state court decisions disappointing property owners could be readily challenged as a judicial taking, there would be significant risk of inhibiting the natural evolution and refinement of this law. See *Rogers* v. *Tennessee*, 532 U.S. at 461.

Third, it is frequently difficult to judge the status of property law from a single state appellate decision. The meaning and significance of state court decisions are often open to dispute, especially when assessed by those who are not regular participants in the judicial system. *Cf. Demorest* v. *City Bank Farmers Trust Co.*, 321 U.S. 36, 41-43 (1944). Decisions authored by different judges at different times complicate extracting the "rule" a state court has announced—or has supposedly repudiated.

These pragmatic considerations have long discouraged the Court from reviewing allegedly erroneous interpretations of state law. See *Dugger* v. *Adams*, 489 U.S. 401, 410 (1989). Were its practice otherwise, "every erroneous decision by a state court on

state law would come [to this Court] as a federal constitutional question." *Engle* v. *Isaac*, 456 U.S. 107, 121 n.21 (1982) (alteration in original; citation omitted).

Furthermore, if allegedly erroneous state judicial rulings can themselves establish the predicate for a takings challenge, it is unclear whether review of such a challenge could occur anywhere except in this Court. An action for compensation in the lower state courts would likely be futile, because the lower courts would not regard themselves at liberty to characterize a decision by a superior court as a taking. And an action challenging the decision of the state court in a federal district court under 42 U.S.C. § 1983 might be barred by the preclusion statute, 28 U.S.C. § 1738, see *San Remo Hotel* v. *City and County of San Fransisco*, 545 U.S. 323 (2005), or by the *Rooker-Feldman* doctrine.

Direct review by this Court is also problematic. As this case illustrates, judicial takings claims almost by definition will not be raised and ruled on below, unless the state court writes an opinion on rehearing. Consequently, the Court will lack the benefit of any lower court decision framing the issues for review. Moreover, often, as here, there will be no factual record generated by the state courts that would allow a meaningful evaluation of such a claim. As Justice Scalia has observed, "[i]t is beyond our power—unless we take the extraordinary step of appointing a master to conduct factual inquiries—to evaluate [a judicial] takings claim." *Stevens* v. *City of Cannon Beach*, 510 U.S. 1207, 1335 (1994) (dissenting from denial of certiorari); see also *Adams*, 520 U.S. at 90-91.

B. The Standard Of Review

Given the paucity of precedent in this area, it is also unclear what the appropriate standard of review should be for assessing a state court's interpretation of state law as the predicate for evaluating a judicial taking claim.

Petitioner urges a standard based on Justice Stewart's concurring opinion in *Hughes* v. *Washington*, 389 U.S. 290, 296 (1967), asking whether the state court decision is "sudden," "unpredictable," or "dramatic." Pet. Br. 50. But this focuses exclusively on fair warning. Notice and fair warning are relevant to a procedural due process challenge, but we stress again that petitioner has not challenged the Florida Supreme Court decision on due process grounds. The suddenness of a change does not necessarily suggest that the change is unprincipled. Even in the due process context, this Court has suggested that the change must not only be "unexpected" but "*indefensible* by reference to the law which had been expressed prior to the conduct in issue," *Rogers* v. *Tennessee*, 532 U.S. at 462 (quoting *Bouie* v. *City of Columbia*, 378 U.S. at 354) (emphasis added).

The standard this Court has applied most often in different contexts asks whether the state court determination of state law had "fair support" in preexisting legal authorities. *Demorest*, 321 U.S. at 42; see Monaghan, 103 Colum. L. Rev. at 1960-1964. This was the standard applied in *Demorest* and *Broad River Power Co.* v. *South Carolina*, 281 U.S. 537, 540-541 (1930), two decisions which, if they arose today, might be framed as judicial takings claims. A decision lacking any fair support will ordinarily be both unpredictable and unprincipled. We therefore proceed on the assumption that "fair sup-

port" is the proper standard of review to apply in determining whether the Florida Supreme Court misinterpreted Florida law so badly that it created the possibility of a judicial taking.

Context is important, however, in applying any standard of review. At noted in Part II.A, there are powerful reasons for deferring to state court determinations of the content and dimensions of property rights under state law. Also, most of the decisions invoking the fair support standard involve claims that state law has been manipulated to evade a federal constitutional right set up below. See, *e.g.*, *Howlett* v. *Rose*, 496 U.S. 356 (1990); *Ward* v. *Bd. of Cty. Comm'rs*, 253 U.S. 17, 22 (1920). Here, no federal claim was raised below; the only alleged federal constitutional violation is the one said to have arisen from the asserted misinterpretation of state law itself. Where there is "no question of evasion of the constitutional issue," *Fox River Paper Co.* v. *Railroad Comm'n*, 274 U.S. 651, 655 (1927), the fair support standard should be applied with an extra measure of deference.

The initial question, then, is whether the Florida court's characterization of the littoral rights enjoyed by petitioner's members prior to the implementation of the Florida Act in the Destin/Walton County Beach restoration project lacked fair support in previous Florida law. Only if the decision lacks fair support in prior law would it be necessary to move to the next question, which is whether this interpretation of state law had consequences for petitioner's members so severe that it constitutes a taking of their property under the Federal Takings Clause.

III. THE FLORIDA SUPREME COURT'S DECISION HAD MORE THAN FAIR SUPPORT—IT DID NOT CHANGE FLORIDA LAW IN ANY SIGNIFICANT RESPECT AT ALL.

Even if it is possible for state courts to render interpretations of state law so lacking in support to establish the predicate for a federal takings claim, nothing approaching that kind of revisionism occurred here.

Petitioner levels its charge of unprincipled change primarily at two aspects of the Florida Supreme Court's decision: its discussion of the common law of accretion and its holding that there is no riparian right to maintain contact with the water. Petitioner's ultimate objective, however, is to obtain a ruling that Florida cannot replace the common-law boundary of littoral lands—the dynamic MHWL—with a fixed boundary in the same location—the ECL.

A. Future Accretion

Petitioner has claimed throughout this litigation that the Act violates Florida constitutional law by taking its members' right to future accretions. In this Court, the claim has mutated into the contention that the Florida Supreme Court violated federal constitutional law by recharacterizing accretion as a "contingent" rather than a "vested" right. Pet. Br. 28-31. No prior Florida decision, however, had ever considered whether the legislature could suspend future accretion in the context of a statute that simultaneously eliminates the risk of future erosion, as the Florida Act does. Fla. Stat. § 161.191(2).

As to the question before it—whether the legislature could simultaneously suspend future accretion

and erosion—the court's entirely sensible answer was that this was permissible, because the adoption of a fixed boundary line renders the concepts of accretion and erosion *irrelevant*. Pet. App. 34. Accretion and erosion only apply when the boundary between upland and sovereign lands gradually shifts back and forth due to additions and subtractions caused by the actions of the waters. Once a boundary is fixed, these concepts have no significance.

There is nothing here that even suggests judicial revisionism. The court recognized the common law doctrine of accretion; the court recognized that the legislature had suspended the common law doctrine; the court explained why this was the only sensible thing to do under the circumstances.

Petitioner nevertheless contends that the Florida Supreme Court changed the law when it characterized accretion as a "contingent, future interest," see Pet. App. 20, whereas previous decisions had spoken of a "vested right" to accretion. But whether land acquired by accretion is vested or contingent is entirely a matter of temporal perspective. As to accretion that has occurred in the past, the land gained by alluvial action is clearly what can be called a vested right. The land belongs to the upland owner; any attempt to seize or transfer it to another could be enjoined, unless the taking was effectuated by a legitimate exercise of eminent domain. As to potential future accretion, the right is obviously contingent, in the ordinary meaning of something that may never happen. In this sense, it is entirely appropriate to speak of accretion that has not yet occurred as a "contingent, future interest."

Moreover, petitioner can point to no previous Florida Supreme Court decision actually holding that

there is a vested right to *future* accretion. Petitioner relies principally on *State* v. *Florida National Properties, Inc.*, 338 So. 2d 13 (Fla. 1976), but the question there was whether the Florida legislature could adopt a fixed boundary line on fresh water lakes between riparian and sovereign submerged lands that would *retroactively eliminate* rights to land previously acquired by upland owners by reliction (drainage). The retroactive elimination of rights to land previously acquired is obviously a far different matter than the prospective suspension of gains and losses of land, which are necessarily uncertain and speculative.[11]

In short, no credible claim can be made that the Florida Supreme Court resolved the state law claim regarding the suspension of accretion and erosion under the Act by re-writing the law of accretion in an unprincipled manner.

B. Contact With The Water

Petitioner also insists that Florida law previously recognized a riparian right to maintain contact with the water, and that the Florida Supreme Court engaged in revisionism by denying the existence of this right. The sole support for this claim is the statement, italicized below, in the following passage from *Board of Trustees* v. *Sand Key Associates., Inc.*:

> Riparian and littoral property rights consist not only of the right to use the water shared by the public, but include the following

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[11] The passages in boldface type quoted in petitioner's brief at pages 28-29 are from the trial judge's opinion in *Florida National*. These passages were dictum, and the Florida Supreme Court did not expressly adopt the trial judge's analysis.

> vested rights: (1) the right of access to the water, *including the right to have the property's contact with the water remain intact*; (2) the right to use the water for navigational purposes; (3) the right to an unobstructed view of the water; and (4) the right to receive accretions and relictions to the property.

512 So. 2d 934, 936 (Fla. 1987) (emphasis added).

We note, preliminarily, that the italicized statement in question was dictum. *Sand Key* presented a question about who owned particular accreted lands; the court was not required to decide whether there was a right to "contact with the water."

Even taken as an authoritative restatement of Florida law, it is doubtful at best whether the *Sand Key* court intended the statement about contact with the water to reflect a right distinct from access. The statement is not separated from access by a new number, as are the other three enumerated riparian rights. It also appears that the source of the statement may have been a 1904 treatise on water rights, where similar language was used to describe the right of access. See 1 H. Farnham, *The Law of Waters and Water Rights* § 62, at 279 (1904) ("The riparian owner is also entitled to have his contact with the water remain intact. This is what is known as the right of access[.]"). As this treatise suggests, "contact with the water" can mean ability to reach the water, as opposed to physically touching it.

In any event, there is no support in Florida law prior to 1987 for petitioner's construction of the italicized statement. There is no mention of a right of physical contact in any Florida decision prior to *Sand Key*. The leading treatise on Florida water law

offers no support for such a right. See F. Maloney et al., *Water Law and Administration: The Florida Experience* §§ 21, 41.1 (1968). Given that the sole support for the "vested right" to maintain physical contact with the water is a statement in a judicial decision in 1987, it is far-fetched to suggest that the Florida Supreme Court impermissibly revised the law by refusing to strike down a statute enacted some seventeen years earlier for failing to recognize this right.

The claimed right of physical contact with water is also inconsistent with key elements of the common law of riparian rights. Avulsive events have been known to occur that result in the deposit of new land on the shore. See *Bryant* v. *Peppe*, 238 So. 2d 836 (Fla. 1970). When this happens, the boundary between the upland owner and the sovereign submerged land does not change. See *id.* at 837. Nevertheless, the avulsion creates a new strip of land between the upland property and the MHWL, which will necessarily eliminate any physical touching of the water by the upland owner. See Maloney, *supra*, § 126.6.

Petitioner argues that littoral land is defined at common law as land that abuts the MHWL, and that this requires at least periodic physical touching of the water. Petitioner claims that if the land no longer touches the water, it will no longer be littoral, and hence all littoral rights will be lost. This claim confuses the source or root of title with the scope and dimension of property rights once title is established. Littoral rights are established by showing that one owns land bounded by the MHWL; once these rights are established, they can endure, even if the condition that gave rise to those rights has changed.

The Florida Act, in the context of a beach reconstruction project, eliminates the defining condition for establishing title to littoral land—abutting the MHWL. But this does not call into question rights previously established which are associated with this land, such as the right of access to water and the right of view. These common law rights, together with vested title to all land upland of the ECL (which tracks the pre-existing MHWL), are expressly preserved by the Act. Fla. Stat. § 161.201.

C. The Establishment Of The ECL

Petitioner's ultimate objective, both in the lower courts and in this Court, is to overturn the use of the fixed boundary line—the ECL—and return to the dynamic boundary defined by the MHWL. Because a beach restoration project will result in a wider beach at a higher elevation than the pre-project beach, the MHWL will shift in a seaward direction after the project is completed. If petitioner can retain the fluctuating MHWL as a property boundary, then petitioner thinks its members can enjoy the benefits of beach restoration and as an added bonus get more private land than they had before. In effect, what petitioner seeks is not less beach protection but *more land*—more land than its members had before the hurricane damage occurred—provided at taxpayers' expense.

Whatever petitioner may hope to achieve through creative constitutional litigation, this is not the result that would obtain at common law. The beach restoration project was not an accretion, since it did not occur "gradually and imperceptibly." See p. 3 & note 2, *supra*. Consequently, the beach restoration would not augment petitioner's members' rights. The restoration project was at once a response to

avulsion—hurricanes Opal and Ivan—and an artificial avulsion undertaken by the State to restore damage caused by these avulsions and prevent future harms. Had the State undertaken the beach restoration project based solely on its common law property rights, these avulsive events would have frozen the boundary between the upland properties and the state land at the *pre-hurricane* MHWL. Petitioner's members would have no claim at common law to new land created by the State seaward of this fixed boundary line. See *Bryant*, 238 So. 2d at 839.

Moreover, petitioner cannot show that there was any understanding, prior to the adoption of the Act, that the use of the MHWL as a boundary was regarded as a *right* of littoral owners. It is true that Florida historically defined the boundaries of littoral land in terms of the fluctuating MHWL, see *Miller* v. *Bay-To-Gulf, Inc.*, 193 So. 425, 427 (Fla. 1940), and continues to do so today with respect to riparian lands not subject to a beach restoration project. But the MHWL was not adopted because littoral owners perceived some value in having an uncertain and variable property boundary. It was adopted out of practical necessity, given the natural fluctuations that continually occur on tidal lands and the lack of public resources available for maintenance of a permanent boundary prior to the adoption of the Act.

There is a broader reason why petitioner's claim is inherently implausible. Petitioner is asserting in effect that variable and uncertain rights cannot be replaced by fixed and certain rights of equivalent value. But fixed and certain rights are generally regarded as a virtue, especially in the law of property. Given the inherent implausibility of its claim, petitioner is forced to proceed by indirection, asserting

the existence of a vested right to future accretion and to physical contact with waters. These rights make sense only if the MHWL remains the boundary. Thus, if petitioner can secure a ruling that accretion and physical contact are vested rights, it hopes this will enshrine the MHWL as a vested right, a proposition for which there is otherwise no support. The Florida Supreme Court saw through this ploy, and its decision should not be disturbed.

D. Other Issues

Petitioner advances a number of additional complaints about the Florida Supreme Court's decision, none of which is substantial.

Petitioner complains that the Florida Supreme Court invoked the common law of avulsion as support for the Florida Act. But petitioner does not suggest that its members suffered any diminution in rights because of the court's discussion of avulsion. The purpose of the court's discussion was to point out that hurricanes are avulsive events, that such events fix the boundary, and that the application of the Act, at least in this case, simply followed the common law in setting the boundary at the pre-avulsion MHWL. Pet. App. 32-33.

Petitioner also suggests that the Florida Supreme Court revised the law by denying that "littoral rights include the right to exclude others from the littoral property." Pet. Br. 21. But the Florida court said nothing about an upland owner's "right to exclude," so there is no possibility of revision on this point. To the extent petitioner is claiming that *the Act* permits the creation of a new dry sand beach between the ECL and the new MHWL, and that *the Act* deprives its members of the "right to exclude" the

public from this strip of sand, then petitioner is raising a federal challenge to the Act that was not pressed or passed on below, and in any event has no basis in law. See pp. 48-49 *infra*.

Finally, petitioner complains repeatedly that the Florida court has allowed "constitutionally protected littoral rights" to be replaced by "inferior and more limited statutory" rights. Pet. Br. 53, 54. This too is a contention that the court failed to invalidate the Act, not a point about judicial revisionism. In any event, petitioner never explains what it means by "constitutionally protected property rights" as opposed to "statutory rights," Pet. Br. 54, or why the latter are "inferior"—and any less constitutionally protected—than the former. This Court has repeatedly recognized that property rights are not created by the Constitution but by nonconstitutional sources of law. See, *e.g.*, *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992) (referring to "our traditional resort to 'existing rules or understandings that stem from an independent source such as state law' to define the range of interests that qualify for protection as 'property' under the Fifth and Fourteenth Amendments," quoting *Roth*, 408 U.S. at 577). There is no indication that the Florida courts share any different understanding.

* * * *

The ultimate question before this Court, it must be stressed, is not whether the Florida Supreme Court correctly described the baseline of Florida property law in determining whether the state legislature had taken riparian rights under Florida constitutional law. As the Court admonished in *Broad River* (and reaffirmed in *Demorest*), "this Court will not inquire whether the rule applied by the state

court is right or wrong, or substitute its own view of what should be deemed the better rule for that of the state court." *Broad River*, 281 U.S. at 541; *Demorest*, 321 U.S. at 42. The only question is whether the Florida court had fair support for its characterization of the property rights petitioner's members enjoyed under Florida law before the Act was implemented in the Destin/Walton Beach project. The answer to that question, it is abundantly clear, is "yes." No judicial taking is presented by this case.

IV. EVEN IF THE FLORIDA SUPREME COURT REVISED STATE LAW WITHOUT FAIR SUPPORT, PETITIONER HAS NO FEDERAL TAKINGS CLAIM.

Petitioner must surmount another hurdle to demonstrate a violation of the U.S. Constitution: it must show that the elimination or modification of rights by the Florida Supreme Court amounted to a taking of property within the meaning of the Constitution.

Not every change in state law—however "sudden" or "unpredictable"—causes a taking cognizable under the Federal Constitution. This is shown by *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74 (1980). There, the California Supreme Court announced a change in California law regarding the rights of shopping center owners to exclude political activists, which was challenged as a judicial taking. See Brief of Appellants at 6, 13, 15-16, *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74 (1980) (No. 79-289). The Court did not reach that question, however, concluding instead that the new interpretation did not sufficiently impair property rights to constitute a taking. See 447 U.S. at 82-84. *PruneYard* instructs that even if a state court decision disturbs

expectations about property rights, it is still necessary to establish that the change constitutes a taking.

The record here contains few facts that ordinarily would be relevant in assessing a federal takings claim. The record is the one generated before the ALJ, which addressed only two nonconstitutional issues. Petitioner's parallel action in the Circuit Court of Leon County (see Appendix B at 20a) could have generated a record on the takings claim. But after the circuit court denied motions for summary judgment, petitioner pressed its takings claim in the court of appeals, based on an administrative record that did not address the takings issue, rather than in the circuit court. As a consequence, this Court is now being asked to adjudicate a novel judicial takings claim on an extremely thin record.

A. Petitioner Has No Cause Of Action Under The Takings Clause

The Takings Clause of the Fifth Amendment, as it applies to the States through the Fourteenth Amendment, contains a "self-executing" cause of action "grounded in the Constitution itself." *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 315 (1987) (citations omitted). Petitioner has no other possible basis for vindicating its judicial taking claim in this Court. The constitutional cause of action requires that the claimant allege that (1) the claimant owns "private property," (2) which has been "taken for public use," (3) without "just compensation." U.S. Const. Amend. V.

Petitioner has not alleged and cannot show that it satisfies two of the three elements set forth in the language of the Clause. STBR has not alleged that it

owns any "private property" and it has not sought an award of "just compensation."

It is elementary, of course, that a claimant must allege a loss of "private property" in order to assert a takings claim. See, *e.g.*, *Phillips* v. *Washington Legal Foundation*, 524 U.S. 156 (1998); *United States* v. *Powelson*, 319 U.S. 266, 281 (1943). This Court has never sustained a takings claim by an entity that owns no property. In *Pennell* v. *City of San Jose*, 485 U.S. 1 (1988), the Court held that an association of landlords had standing to challenge a local rent control ordinance as a taking, regardless of whether an individual landlord who also joined the suit had standing. *Id.* at 7-8 & n.4.[12] The question whether the association could state a cause of action under the Takings Clause was not addressed. The Court denied the takings claim, finding it was "premature" given the state of the record. *Id.* at 9-11. All other takings cases decided by this Court have involved at least one claimant who owned property. See, *e.g.*, *Brown* v. *Legal Foundation of Washington*, 538 U.S. 216, 228 (2003); *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U.S. 302, 312 (2002); *Phillips*, 524 U.S. at 162-63; *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 478 (1987); *Hodel* v. *Virginia Surface Min-*

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[12] Under *Pennell* and *United Food and Commercial Workers Union Local 751* v. *Brown Group, Inc.*, 517 U.S. 544, 554, 556-557 (1996), STBR appears to satisfy this Court's Article III requirements for associational standing. But standing and cause of action are distinct requirements. See *Davis* v. *Passman*, 442 U.S. 228, 239 n.18 (1979). Here, it is settled that the Takings Clause supplies the relevant cause of action, and the question is whether STBR can satisfy its elements.

ing & Reclamation Ass'n Inc., 452 U.S. 264, 273 (1981).

STBR is a non-profit Florida corporation that consists of six members. Pet. 10 n.16. STBR's members own private property. J.A. 211. But STBR has never claimed to own any property itself, see Pet. App. 73, and STBR is the "sole Petitioner" in this case. Pet. Br. ii. Since STBR owns no property, it cannot complain of a taking of property.

The Court has also made plain that the Takings Clause is violated only when the state denies compensation for property it has taken: "The basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First English*, 482 U.S. at 315. Consequently, a takings claim is not ripe for this Court's consideration unless the claimant has sought and been denied compensation by the State. See *Williamson County Regional Planning Comm.* v. *Hamilton Bank*, 473 U.S. 172, 194-197 (1985).

STBR has never sought compensation for any alleged taking of riparian rights in this case. The case began as an action under the Florida APA, in which STBR sought a declaratory judgment that the permit issued by the DEP and the ECL approved by the Board were invalid. STBR never asked for compensation for its members, and could not, because the Florida APA provides only for declaratory and injunctive relief. Fla. Stat. § 120.68(6). If STBR wanted to obtain an award of compensation, it should have filed an action, joined by individual property owners, in the Florida Circuit Court—which it did (Appendix B,

infra), but that case has been held in abeyance, and is not the action that is now before this Court.[13]

In short, petitioner can assert no judicial takings claim, because it owns no property and seeks no compensation, and thus has no cause of action under the Takings Clause.

B. The Appropriate Unit Of Analysis Is The Whole Littoral Parcel As It Existed Before The Project Commenced

If a takings claim is properly presented, then a critical question concerns the relevant unit of property for determining the impact of the action that caused the asserted taking. This is different from determining whether the interest allegedly taken is "property." We acknowledge that the land owned by petitioner's members, and the various incidents of ownership related to the use of the foreshore and the water associated with that land due to its littoral status, are properly characterized as "property" for federal constitutional analysis.[14] Still, it is necessary

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[13] Given that STBR has not and could not seek compensation in this case, it is unnecessary to consider whether the case is ripe under the branch of *Williamson County* that asks whether the State has denied compensation. See 473 U.S. at 194-197. Obviously the State cannot deny compensation when it has not been sought.

[14] Land has always been regarded as a type of property for federal constitutional purposes. See *Lucas*, 505 U.S. at 1016 n.7. Moreover, under Florida law "[r]iparian rights are property rights, incorporeal interests in real estate." *Belvedere Dev. Corp.* v. *Dep't of Transp.*, 476 So. 2d 649, 653 (Fla. 1985). Absent an agreement to the contrary, these rights "are appurtenant to and are inseparable from the riparian land." Fla. Stat. § 253.141(1); *cf. Belvedere*, *supra*. Consequently, they run with the land, without regard to the identity of the owner. They have

to determine the correct unit of property for assessing the impact of the challenged state action. Specifically, is the proper unit of analysis the whole littoral parcel including all appurtenant riparian rights, or should each riparian right be regarded as a distinct and separate item of property? In the familiar metaphor of property as a bundle of rights, is the proper unit the bundle taken as a whole, or each individual stick in the bundle?

Here, both federal constitutional law and Florida law point to the same conclusion: the proper unit is the whole parcel with all appurtenant riparian rights. This Court in a variety of contexts involving real property has held that the appropriate unit of analysis is the "whole parcel." Thus, in *Tahoe-Sierra* the Court held that the relevant unit for purposes of assessing a temporary moratorium on development was the entire life span of the property, not the time period in which the moratorium was in effect. 535 U.S. at 327-329. The Court said the "aggregate must be viewed in its entirety" along both spatial and temporal dimensions. *Id.* at 327 (citation omitted). See also *Keystone Bituminous*, 480 U.S. at 497; *Penn Cent. Transp. Co.* v. *New York City*, 438 U.S. 104, 130-131 (1978).

Florida law is to the same effect. Particularly telling is *Belvedere Development Corp.* v. *Department of Transportation*, 476 So. 2d 649 (Fla. 1985). The certified question was: "Does Florida law permit riparian (or littoral) rights to be separated from riparian land?" *Id.* at 650. The Florida Supreme Court answered that absent a voluntary deed of conveyance of

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been characterized as implied easements, *Brickell* v. *Trammell*, 82 So. 221, 226-227 (Fla. 1919), and easements in land are universally regarded as property rights.

riparian rights from the upland owner, "riparian rights are an inherent aspect of upland ownership, and not severable from it." *Id.* at 651.

Petitioner's argument, contrary to these authorities, assumes that the correct unit of analysis is each separate riparian right. Insofar as petitioner claims a judicial taking, its argument shows at most that the Florida Supreme Court eliminated the right to future accretions and the right to contact with the water. In claiming that the elimination of these rights is a federal taking, petitioner has in effect "conceptually severed" these discrete rights from the whole of the property, treating each right as if it were a freestanding item of property. This Court has repeatedly recognized that this is impermissible. See *Tahoe-Sierra*, 535 U.S. at 331 (noting that "defining the property interest taken in terms of the very regulation being challenged is circular"); *Concrete Pipe & Prods. of Cal., Inc.* v. *Constr. Laborers Pension Trust*, 508 U.S. 602, 644 (1993) (warning that "a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable").

A second and equally important question concerns the point in time at which the value of the relevant unit is ascertained. Takings analysis requires a before-and-after measurement of property. The appropriate time at which to ascertain the scope of a claimant's "before" interest is immediately prior to the state action that is alleged to cause the taking. See, *e.g.*, *United States* v. *Va. Elec. & Power Co.*, 365 U.S. 624, 632 (1961). The claimant is not allowed to recover any increase in value due to the "projected improvement" brought about by the government pro-

ject itself. *United States* v. *Miller*, 317 U.S. 369, 377 (1943).

Here, the scope of petitioner's members' rights should be determined as they stood *before* the beach restoration project commenced. Their rights at that time would not include any enhanced ownership of land attributable to the beach restoration itself, or any other rights the statute confers once reconstruction is undertaken.

In particular, petitioner's claim of an entitlement to a strip of the reconstructed beach between the ECL and the new MHWL cannot be regarded as part of their baseline of property rights, because this strip of beach was *only created because of the state restoration project that is the very undertaking petitioner challenges as a taking*. Petitioner claims that the Act deprives its members of "the right to exclude persons from the dry [s]and beach in front of their homes to the post-nourishment MHWL," Pet. Br. 54-55, and that they have lost any right to "make a profit" from, "dispose of or sell" this new strip of sand. *Id.* at 58. Petitioner is here complaining of the loss of property that *did not exist* when the restoration project started. The property petitioner says has been taken was created by the government on land owned by the government with funding provided by the government. The correct baseline for measuring the impact of the Florida court decision is what petitioner's members lost because of the challenged action, not what they would like to gain.

In sum, the appropriate baseline of rights with which to analyze petitioner's takings claim is the entire bundle of property rights petitioner's members enjoyed immediately before the beach reconstruction project was undertaken.

C. No Physical Invasion Of Petitioner's Members' Lands Is Presented

Petitioner's principal argument for why the Florida Supreme Court's decision violated the Takings Clause is that it sanctioned a "physical invasion" of petitioner's members' property. Pet. Br. 51-53. The attempt is to shoehorn this case into the line of decisions, exemplified by *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), holding that permanent physical occupations of land by the government are categorically regarded as takings without regard to the impact on the owner's bundle of property rights. This Court has rejected attempts to apply *Loretto* to state interventions that affect the value of property, but fall short of an actual physical invasion. See, *e.g.*, *Yee* v. *City of Escondido*, 503 U.S. 519, 527 (1992).

There can be no claim that either the Florida Act or the Destin/Walton County Beach project caused a physical invasion of the column of space that defines petitioner's members' ownership of land. Petitioner contends that the substitution of a fixed ECL for a dynamic MHWL "effects a physical taking of STBR's members' property." Pet. Br. 52. But petitioner abandoned any claim in the administrative proceedings that the location of the ECL deviated in any respect from the previous MHWL. On this record, it must be accepted that although the boundaries of petitioner's members' properties are now fixed rather than fluctuating, they are physically located exactly where they were before the ECL was established. Petitioner's members' land has not been physically diminished in any way by the restoration project.

Petitioner's brief asserts that respondents trespassed on their land in rebuilding the beach. Pet. Br.

12 n.9. No allegation was made below that respondents either entered petitioner's members' land without their consent, or sanctioned such actions by others, and the record supports no such claim.[15] Petitioner also asserts that the beach restoration will result in multiple vendors hawking merchandise and services on the new beach created by the project. Pet. Br. 55. Again, no evidence was presented below about the nature or extent of public activity permitted on the new beach, which in any event is located on state sovereign land. See Fla. Stat. § 161.191. Consequently, there is no physical occupation of members' land within the meaning of *Loretto*.

D. The Eminent Domain Framework

Perhaps the most straightforward way to assess the takings claim in this case is to consider the matter from the perspective of eminent domain law. After all, this is a challenge to a government construction project, which frequently requires use of eminent domain, and not to land use regulations.

The matter is analogous to one in which the government decides to rebuild a public street. See *United States* v. *Willow River Power Co.*, 324 U.S. 499, 510-511 (1945) (relying on this analogy in resolving a takings claim involving riparian rights).

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[15] In an affidavit filed in the Florida District Court of Appeals, petitioner alleged that "renourishment" activity occurred on the land of two of its members. J.A. 278. The affidavit does not indicate, however, that either of these members joined a letter signed by the four other members informing Walton County and its contractor that they did not have permission to enter their property. *Id.* at 276-277. The record is thus consistent with the possibility that these members either did not object or granted oral permission to the contractor to enter.

Suppose the government decides to raise and widen a street, staying within the bounds of a right of way as to which it already holds the necessary rights. Abutting landowners complain that the project will diminish the value of their property, for example by impairing access, or by increasing noise and traffic, or by diminishing the quality of their view. The eminent domain issue is whether these indirect or consequential harms to abutting owners give rise to a federal constitutional right to compensation.

The general principles governing this question have been well established. If there is no physical appropriation of the abutting landowners' property, "the Constitution has never been construed as requiring payment of consequential damages." *Miller*, 317 U.S. at 376; see also, *e.g.*, *Willow River*, *supra*. Thus, as long as the construction project stays within the bounds of the existing right of way, there is no constitutional obligation to compensate adjacent landowners for injuries due to changes in the grade of the street, *Ettor* v. *City of Tacoma*, 228 U.S. 148 (1913); temporary lack of access during public construction activities, *N. Transp. Co.* v. *Chicago*, 99 U.S. 635 (1878); ordinary nuisances attributed to increased traffic, *Richards* v. *Washington Terminal Co.*, 233 U.S. 546 (1914); loss of view, *Reichelderfer* v. *Quinn*, 287 U.S. 315 (1932); or loss or even destruction of businesses, *Mitchell* v. *United States*, 267 U.S. 341 (1925). These sorts of consequential damages are regarded, as a matter of constitutional law, as *damnum absque injuria*.

There is a further, and equally dispositive, reason why there is no taking under the eminent domain framework. This Court has held that the government is permitted to consider offsetting benefits

to owners in cases involving partial takings of land. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 150 (1974); *Bauman* v. *Ross*, 167 U.S. 548 (1897). If the government can consider offsetting benefits in partial takings, then it may consider offsetting benefits in cases with no physical invasion at all. The Florida Act *expressly directs* that offsetting benefits be considered in any action seeking just compensation for a taking of property pursuant to beach restoration. Fla. Stat. § 161.212(3)(b).

Petitioner's members received extensive benefits from the beach restoration project, including: the suspension of common law liability to erosion; enhanced protection against erosion and avulsion provided at public expense by the project itself; enhanced protection of structures from future storm surges provided at public expense; express preservation of common law rights of access, view, and use of the waters; the government's guarantee that no structures will be allowed between private property and the waters; and the government's guarantee that beach activities injurious to upland owner's interests will not be allowed. See Fla. Stat. § 161.201.

The elimination of future erosion more than offsets the loss of opportunities for future accretion. Petitioner suggests that its members live on an "accreting beach," Pet. Br. 6, intimating that they are net losers from a suspension of accretion and erosion. The record contains no support for this claim. The uncontradicted testimony of the DEP's expert was that the beach is "significantly eroding." J.A. 163.[16]

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[16] Petitioner cites in support of its claim of an "accreting beach" a passage from the Environment Assessment. This says that "[n]et longshore transport rates" reveal "an accretive trend"

As to having one's land physically touch the water, this is of little value aside from its legal significance at common law—for which the Act provides a more secure equivalent. The project will at least temporarily add distance between petitioner's members' property and the water line. But whether this is detrimental is doubtful. Petitioner's members may have to walk a few additional steps to reach the water, but they will also have more beach to use for recreational activities, and members of the public—who were using the beach prior to the restoration—are likely to remove themselves farther from petitioner's members property.

In sum, the detriments, if any, associated with suspension of the common law of accretion and the loss of physical contact with the water cannot outweigh the benefits provided by the Act and the project. As this Court has observed in a related context, "if governmental activities inflict slight damage upon land in one respect and actually confer great benefits when measured in the whole, to compensate the landowner further would be to grant him a special bounty." *United States* v. *Sponenbarger*, 308 U.S. 256, 266-267 (1939). For the same reason, the Florida Supreme Court, even assuming its decision had no fair support, did not commit a judicial taking.[17]

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that would allow the beach to recover on its own "absent storms," but that "insufficient recovery times between storms have caused the present unhealthy beach conditions." J.A. 252. In other words, because of frequent storms the beach is eroding.

[17] Petitioner implicitly acknowledges that under the ad hoc takings framework associated with *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104, 124 (1978), there is no taking. The record contains no evidence directly bearing on two critical *Penn Central* factors: diminution in value and the impact on petitioner's investment-backed expectations. Any defi-

CONCLUSION

The decision of the Florida Supreme Court should be affirmed.

Respectfully submitted.

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ciencies in the record on this score must be attributed to petitioner's litigation choices, and petitioner must bear the consequences of failing to advance or prove a *Penn Central* claim.

APPENDICES

APPENDIX A

Florida Statutes (2009)

Excerpts of Title XI Chapter 161, Part I:

Regulation of Construction, Reconstruction, and Other Physical Activity

161.011 Short title.—Parts I and II of this chapter may be known and cited as the "Beach and Shore Preservation Act."

161.021 Definitions.—In construing these statutes, where the context does not clearly indicate otherwise, the word, phrase, or term:

(1) "Access" or "public access" as used in ss. 161.041, 161.052, and 161.053 means the public's right to laterally traverse the sandy beaches of this state where such access exists on or after July 1, 1987, or where the public has established an accessway through private lands to lands seaward of the mean high tide or water line by prescription, prescriptive easement, or any other legal means, development or construction shall not interfere with such right of public access unless a comparable alternative accessway is provided.

(2) "Beach and shore preservation," "erosion control, beach preservation and hurricane protection," "beach erosion control" and "erosion control" includes, but is not limited to, erosion control, hurricane protection, coastal flood control, shoreline and offshore rehabilitation, and regulation of work and activities likely to affect the physical condition of the beach or shore.

(3) "Beach nourishment" means the maintenance of a restored beach by the replacement of sand.

(4) "Beach restoration" means the placement of sand on an eroded beach for the purposes of restoring it as a recreational beach and providing storm protection for upland properties.

(5) "Board of trustees" means the Board of Trustees of the Internal Improvement Trust Fund.

(6) "Coastal construction" includes any work or activity which is likely to have a material physical effect on existing coastal conditions or natural shore and inlet processes.

(7) "Department" means the Department of Environmental Protection.

(8) "Emergency" means any unusual incident resulting from natural or unnatural causes which endangers the health, safety, or resources of the residents of the state, including damages or erosion to any shoreline resulting from a hurricane, storm, or other such violent disturbance.

(9) "Inlet sediment bypassing" includes any transfer of sediment from an inlet or beach to another stretch of beach for the purpose of nourishment and beach erosion control.

(10) "Local government" means a county, municipality, community development district, or independent special taxing district.

* * * * *

161.088 Declaration of public policy respecting beach erosion control and beach restoration and nourishment projects.—Because beach erosion is a serious menace to the economy

and general welfare of the people of this state and has advanced to emergency proportions, it is hereby declared to be a necessary governmental responsibility to properly manage and protect Florida beaches fronting on the Atlantic Ocean, Gulf of Mexico, and Straits of Florida from erosion and that the Legislature make provision for beach restoration and nourishment projects, including inlet management projects that cost-effectively provide beach-quality material for adjacent critically eroded beaches. The Legislature declares that such beach restoration and nourishment projects, as approved pursuant to s. 161.161, are in the public interest; must be in an area designated as critically eroded shoreline, or benefit an adjacent critically eroded shoreline; must have a clearly identifiable beach management benefit consistent with the state's beach management plan; and must be designed to reduce potential upland damage or mitigate adverse impacts caused by improved, modified, or altered inlets, coastal armoring, or existing upland development. Given the extent of the problem of critically eroded beaches, it is also declared that beach restoration and nourishment projects shall be funded in a manner that encourages all cost-saving strategies, fosters regional coordination of projects, improves the performance of projects, and provides long-term solutions. The Legislature further declares that nothing herein is intended to reduce or amend the beach protection programs otherwise established in this chapter or to result in local governments altering the coastal management elements of their local government comprehensive plans pursuant to chapter 163.

161.141 Property rights of state and private upland owners in beach restoration project areas.—The Legislature declares that it is the public

policy of the state to cause to be fixed and determined, pursuant to beach restoration, beach nourishment, and erosion control projects, the boundary line between sovereignty lands of the state bordering on the Atlantic Ocean, the Gulf of Mexico, or the Straits of Florida, and the bays, lagoons, and other tidal reaches thereof, and the upland properties adjacent thereto; except that such boundary line shall not be fixed for beach restoration projects that result from inlet or navigation channel maintenance dredging projects unless such projects involve the construction of authorized beach restoration projects. However, prior to construction of such a beach restoration project, the board of trustees must establish the line of mean high water for the area to be restored; and any additions to the upland property landward of the established line of mean high water which result from the restoration project remain the property of the upland owner subject to all governmental regulations and are not to be used to justify increased density or the relocation of the coastal construction control line as may be in effect for such upland property. The resulting additions to upland property are also subject to a public easement for traditional uses of the sandy beach consistent with uses that would have been allowed prior to the need for the restoration project. It is further declared that there is no intention on the part of the state to extend its claims to lands not already held by it or to deprive any upland or submerged land owner of the legitimate and constitutional use and enjoyment of his or her property. If an authorized beach restoration, beach nourishment, and erosion control project cannot reasonably be accomplished without the taking of private property, the taking must be made by the requesting authority by eminent domain proceed-

ings. In any action alleging a taking of all or part of a property or property right as a result of a beach restoration project, in determining whether such taking has occurred or the value of any damage alleged with respect to the owner's remaining upland property adjoining the beach restoration project, the enhancement, if any, in value of the owner's remaining adjoining property of the upland property owner by reason of the beach restoration project shall be considered. If a taking is judicially determined to have occurred as a result of a beach restoration project, the enhancement in value to the owner's remaining adjoining property by reason of the beach restoration project shall be offset against the value of the damage, if any, resulting to such remaining adjoining property of the upland property owner by reason of the beach restoration project, but such enhancement in the value shall not be offset against the value of the property or property right alleged to have been taken. If the enhancement in value shall exceed the value of the damage, if any, to the remaining adjoining property, there shall be no recovery over against the property owner for such excess.

* * * * *

161.151 Definitions; ss. 161.141-161.211.—As used in ss. 161.141-161.211:

(1) "Board of trustees" means the Board of Trustees of the Internal Improvement Trust Fund.

(2) "Requesting authority" means any coastal county, municipality, or beach erosion control district which requests a survey by the board of trustees under the provisions of ss. 161.141-161.211.

(3) "Erosion control line" means the line determined in accordance with the provisions of ss.

161.141-161.211 which represents the landward extent of the claims of the state in its capacity as sovereign titleholder of the submerged bottoms and shores of the Atlantic Ocean, the Gulf of Mexico, and the bays, lagoons and other tidal reaches thereof on the date of the recording of the survey as authorized in s. 161.181.

(4) "Authorized beach restoration project" means a beach project authorized by the United States Congress or the department which involves a specific project engineering design and a project maintenance program for a period of not less than 10 years.

161.161 Procedure for approval of projects.—

(1) The department shall develop and maintain a comprehensive long-term management plan for the restoration and maintenance of the state's critically eroded beaches fronting the Atlantic Ocean, Gulf of Mexico, and Straits of Florida. The beach management plan shall:

(a) Address long-term solutions to the problem of critically eroded beaches in this state.

(b) Evaluate each improved, modified, or altered inlet and determine whether the inlet is a significant cause of beach erosion. With respect to each inlet determined to be a significant cause of beach erosion, the plan shall include:

1. The extent to which such inlet causes beach erosion and recommendations to mitigate the erosive impact of the inlet, including, but not limited to, recommendations regarding inlet sediment bypassing; modifications to channel dredging, jetty design, and disposal of spoil material; estab-

lishment of feeder beaches; and beach restoration and beach nourishment; and

2. Cost estimates necessary to take inlet corrective measures and recommendations regarding cost sharing among the beneficiaries of such inlet.

(c) Design criteria for beach restoration and beach nourishment projects, including, but not limited to:

1. Dune elevation and width and revegetation and stabilization requirements; and

2. Beach profile.

(d) Evaluate the establishment of feeder beaches as an alternative to direct beach restoration and recommend the location of such feeder beaches and the source of beach-compatible sand.

(e) Identify causes of shoreline erosion and change, calculate erosion rates, and project long-term erosion for all major beach and dune systems by surveys and profiles.

(f) Identify shoreline development and degree of density and assess impacts of development and shoreline protective structures on shoreline change and erosion.

(g) Identify short-term and long-term economic costs and benefits of beaches, including recreational value to user groups, tax base, revenues generated, and beach acquisition and maintenance costs.

(h) Study dune and vegetation conditions.

(i) Identify beach areas used by marine turtles and develop strategies for protection of the turtles and their nests and nesting locations.

(j) Identify alternative management responses to preserve undeveloped beach and dune systems, to restore damaged beach and dune systems, and to prevent inappropriate development and redevelopment on migrating beaches, and consider beach restoration and nourishment, armoring, relocation and abandonment, dune and vegetation restoration, and acquisition.

(k) Establish criteria, including costs and specific implementation actions, for alternative management techniques.

(l) Select and recommend appropriate management measures for all of the state's sandy beaches in a beach management program.

(m) Establish a list of beach restoration and beach nourishment projects, arranged in order of priority, and the funding levels needed for such projects.

The beach management plan may be prepared at the regional level based upon areas of greatest need and probable federal funding. Such regional plans shall be components of the statewide beach management plan and shall serve as the basis for state funding decisions upon approval in accordance with chapter 86-138, Laws of Florida. In accordance with a schedule established for the submission of regional plans by the department, any completed plan must be submitted to the secretary of the department for approval no later than March 1 of each year. These regional plans shall include, but shall not be limited to, recommendations of appropriate funding mechanisms for implementing projects in the beach management plan, giving consideration to the use of single-county and multicounty taxing districts or other

revenue generation measures by state and local governments and the private sector. Prior to presenting the plan to the secretary of the department, the department shall hold a public meeting in the areas for which the plan is prepared. The plan submission schedule shall be submitted to the secretary for approval. Any revisions to such schedule must be approved in like manner.

(2) Upon approval of the beach management plan, the secretary shall present to the President of the Senate, the Speaker of the House of Representatives, and the chairs of the legislative appropriations committees recommendations for funding of beach erosion control projects. Such recommendations shall be presented to such members of the Legislature in the priority order specified in the plan and established pursuant to criteria contained in s. 161.101(14).

(3) Once a project is determined to be undertaken, a survey of all or part of the shoreline within the jurisdiction of the local government in which the beach is located shall be conducted in order to establish the area of beach to be protected by the project and locate an erosion control line. No provision of ss. 161.141-161.211 shall be construed as preventing a local government from participating in the funding of erosion control projects or surveys undertaken in accordance with the provisions of ss. 161.141-161.211. In lieu of conducting a survey, the board of trustees may accept and approve a survey as initiated, conducted, and submitted by the appropriate local government if said survey is made in conformity with the appropriate principles set forth in ss. 161.141-161.211.

(4) Upon completion of the survey depicting the area of the beach erosion control project and the proposed location of the erosion control line, the board of trustees shall give notice of the survey and the date on which the board of trustees will hold a public hearing for the purpose of receiving evidence on the merits of the proposed erosion control line and, if approval is granted, of locating and establishing such requested erosion control line. Such notice shall be by publication in a newspaper of general circulation published in the county or counties in which the proposed beach erosion control project shall be located not less than once a week for 3 consecutive weeks and by mailing copies of such notice by certified or registered mail to each riparian owner of record of upland property lying within 1,000 feet (radial distance) of the shoreline to be extended through construction of the proposed beach erosion control project, as his or her name and address appear upon the latest tax assessment roll, in order that any persons who have an interest in the location of such requested erosion control line can be present at such hearing to submit their views concerning the precise location of the proposed erosion control line. Such notice shall be in addition to any notice requirement in chapter 120.

(5) The board of trustees shall approve or disapprove the erosion control line for a beach restoration project. In locating said line, the board of trustees shall be guided by the existing line of mean high water, bearing in mind the requirements of proper engineering in the beach restoration project, the extent to which erosion or avulsion has occurred, and the need to protect existing ownership of as much upland as is reasonably possible.

(6) In no event shall the department undertake a beach restoration or beach nourishment project where a local share is required without the approval of the local government or governments responsible for that local share.

(7) The department may adopt rules to administer this section.

* * * * *

161.181 Recording of resolution and survey of board of trustees.—If no review is taken within the time prescribed from the decision of the board of trustees or, if review be timely taken, in the absence of a final decision of a court of competent jurisdiction preventing the implementation of a beach erosion control project or invalidating, abolishing, or otherwise preventing the establishment and recordation of the erosion control line as provided herein, the board of trustees shall file in the public records of the county or counties in which the erosion control line lies, a copy of its resolution approving the beach erosion control project and locating the erosion control line and shall also file and cause to be recorded in the book of plats of said county or counties a survey showing the area of beach to be protected and the location of the erosion control line.

161.191 Vesting of title to lands.

(1) Upon the filing of a copy of the board of trustees' resolution and the recording of the survey showing the location of the erosion control line and the area of beach to be protected as provided in s. 161.181, title to all lands seaward of the erosion control line shall be deemed to be vested in the state by right of its sovereignty, and title to all lands landward of such line shall be vested in the riparian up-

land owners whose lands either abut the erosion control line or would have abutted the line if it had been located directly on the line of mean high water on the date the board of trustees' survey was recorded.

(2) Once the erosion control line along any segment of the shoreline has been established in accordance with the provisions of ss. 161.141-161.211, the common law shall no longer operate to increase or decrease the proportions of any upland property lying landward of such line, either by accretion or erosion or by any other natural or artificial process, except as provided in s. 161.211(2) and (3). However, the state shall not extend, or permit to be extended through artificial means, that portion of the protected beach lying seaward of the erosion control line beyond the limits set forth in the survey recorded by the board of trustees unless the state first obtains the written consent of all riparian upland owners whose view or access to the water's edge would be altered or impaired.

161.201 Preservation of common-law rights.—Any upland owner or lessee who by operation of ss. 161.141-161.211 ceases to be a holder of title to the mean high-water line shall, nonetheless, continue to be entitled to all common-law riparian rights except as otherwise provided in s. 161.191(2), including but not limited to rights of ingress, egress, view, boating, bathing, and fishing. In addition the state shall not allow any structure to be erected upon lands created, either naturally or artificially, seaward of any erosion control line fixed in accordance with the provisions of ss. 161.141-161.211, except such structures required for the prevention of erosion. Neither shall such use be permitted by the state as may be injurious to the person, business, or

property of the upland owner or lessee; and the several municipalities, counties and special districts are authorized and directed to enforce this provision through the exercise of their respective police powers.

161.211 Cancellation of resolution for nonperformance by board of trustees.—

(1) If for any reason construction of the beach erosion control project authorized by the board of trustees is not commenced within 2 years from the date of the recording of the board of trustees' survey, as provided in s. 161.181, or in the event construction is commenced but halted for a period exceeding 6 months from commencement, then, upon receipt of a written petition signed by those owners or lessees of a majority of the lineal feet of riparian property which either abuts or would have abutted the erosion control line if the same had been located at the line of mean high water on the date the board of trustees' survey was recorded, the board of trustees shall forthwith cause to be canceled and vacated of record the resolution authorizing the beach erosion control project and the survey locating the erosion control line, and the erosion control line shall be null and void and of no further force or effect.

(2) If the state, county, municipality, erosion control district, or other governmental agency charged with the responsibility of maintaining the protected beach fails to maintain the same and as a result thereof the shoreline gradually recedes to a point or points landward of the erosion control line as established herein, the provisions of s. 161.191(2) shall cease to be operative as to the affected upland.

(3) In the event a substantial portion of the shoreline encompassed within the erosion control project recedes landward of the erosion control line, the board of trustees, on its own initiative, may direct or request, or, upon receipt of a written petition signed by the owners or lessees of a majority of the lineal feet of riparian property lying within the erosion control project, shall direct or request, the agency charged with the responsibility of maintaining the beach to restore the same to the extent provided for in the board of trustees' recorded survey. If the beach is not restored as directed or requested by the board of trustees within a period of 1 year from the date of the directive or request, the board of trustees shall forthwith cause to be canceled and vacated of record the resolution authorizing the beach erosion control project and the survey locating the erosion control line, and the erosion control line shall be null and void and of no further force or effect.

161.212 Judicial review relating to permits and licenses.—

(1) As used in this section, unless the context otherwise requires:

(a) "Agency" means any official, officer, commission, authority, council, committee, department, division, bureau, board, section, or other unit or entity of state government.

(b) "Permit" means any permit or license required by this chapter.

(2) Any person substantially affected by a final action of any agency with respect to a permit may seek review within 90 days of the rendering of such decision and request monetary damages and other relief in the circuit court in the judicial circuit in

which the affected property is located; however, circuit court review shall be confined solely to determining whether final agency action is an unreasonable exercise of the state's police power constituting a taking without just compensation. Review of final agency action for the purpose of determining whether the action is in accordance with existing statutes or rules and based on competent substantial evidence shall proceed in accordance with chapter 120.

(3) If the court determines the decision reviewed is an unreasonable exercise of the state's police power constituting a taking without just compensation, the court shall remand the matter to the agency which shall, within a reasonable time:

(a) Agree to issue the permit;

(b) Agree to pay appropriate monetary damages; however, in determining the amount of compensation to be paid, consideration shall be given by the court to any enhancement to the value of the land attributable to governmental action; or

(c) Agree to modify its decision to avoid an unreasonable exercise of police power.

(4) The agency shall submit a statement of its agreed-upon action to the court in the form of a proposed order. If the action is a reasonable exercise of police power, the court shall enter its final order approving the proposed order. If the agency fails to submit a proposed order within a reasonable time not to exceed 90 days which specifies an action that is a reasonable exercise of police power, the court may order the agency to perform any of the alternatives specified in subsection (3).

(5) The court shall award reasonable attorney's fees and court costs to the agency or substantially affected person, whichever prevails.

(6) The provisions of this section are cumulative and shall not be deemed to abrogate any other remedies provided by law.

APPENDIX B*

**IN THE CIRCUIT COURT OF
THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA**

SAVE OUR BEACHES, INC., a Florida Not-for-Profit Corporation, STOP THE BEACH RENOURISHMENT, INC., a Florida Not-for-Profit Corporation FLAMINGO INVESTMENT PROPERTIES, LLC, a Florida Limited Liability Company, PATRICK ROSS, DENNIS T. JONES, TAMMY N. ALFORD, SLADE LINDSAY, Plaintiffs, vs. BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND; FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION; THE CITY OF DESTIN, a Municipal Corporation; and WALTON COUNTY, a political subdivision of the State of Florida, Defendants.	**CASE NO. 04-CA-2093**

* This Amended Complaint has been reproduced as filed, including any typographical errors.

AMENDED COMPLAINT

Plaintiffs, SAVE OUR BEACHES, INC., and STOP THE BEACH RENOURISHMENT, INC., Florida Nor-for-Profit Corporations, FLAMINGO INVESTMENT PROPERTIES, LLC, a Florida Limited Liability Company, PATRICK ROSS, DENNIS T. JONES, TAMMY N. ALFORD, and SLADE LINDSAY, (collectively "Plaintiffs") by and through their undersigned counsel, hereby sue the Defendants, BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND ("TRUSTEES"), FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION ("DEP"), THE CITY OF DESTIN, FLORIDA ("DESTIN"), a Municipal Corporation, WALTON COUNTY, FLORIDA ("WALTON"), a political subdivision of the State of Florida (collectively "Defendants") and allege as follows:

JURISDICTION AND VENUE

1. This is an action for declaratory and injunctive relief involving rights and liabilities in excess of fifteen thousand dollars ($15,000.00), exclusive of interest and attorneys fees, and brought pursuant to Florida common law, the Florida Declaratory Judgment Act, Chapter 86, Fla. Stat., the Florida Constitution, and the Fifth and Fourteenth Amendments of the United States Constitution.

2. Venue in this Court is proper in that Defendants, TRUSTEES, and DEP reside in Leon County.

PARTIES

3. Plaintiff, Flamingo Investment Properties, LLC, ("Flamingo") is a Florida Limited Liability Company organized and existing under the laws of the State of Florida, situated in Okaloosa County, Florida. Flamingo owns several parcels of real prop-

erty (County parcel numbers 00-2S-22-0580-000A-007P; 00-2S-22-0595-0000-0080; 00-2S-22-0584-0000-0100) in Okaloosa County fronting the Gulf of Mexico such that the boundary of their property is the mean high water line of the Gulf of Mexico.

4. Plaintiff, Patrick Ross, is an individual owning a two parcels of property (County parcel number 00-2S-22-1076-0000-0090) in Okaloosa County fronting the Gulf of Mexico such that the boundary of his property is the mean high water line of the Gulf of Mexico.

5. Plaintiff, Dennis T. Jones, is an individual owning a parcel of property (County parcel number 00-2S-22-0080-0000-0070) in Okaloosa County fronting the Gulf of Mexico such that the boundary of his property is the mean high water line of the Gulf of Mexico.

6. Plaintiff, Tammy N. Alford, is an individual owning a parcel of property (County parcel number 34-2S-21-42000-019-0010) in Walton County fronting the Gulf of Mexico such that the boundary of her property is the mean high water line of the Gulf of Mexico.

7. Plaintiff, Slade Lindsay, is an individual owning a parcel of property (County parcel number 34-25-21-42000-019-0011) in Walton County fronting the Gulf of Mexico such that the boundary of his property is the mean high water line of the Gulf of Mexico.

8. Plaintiff, Save Our Beaches, Inc., ("SOB") is comprised of individuals owning real property along the Gulf of Mexico within the City limits of the City of Destin, Okaloosa County, Florida. *See* Exhibit "A" which includes members of SOB.

9. A substantial number of SOB's members (including individual Plaintiffs Flamingo, Ross, and Jones) own property in the City of Destin fronting the Gulf of Mexico such that the boundary of their property is the mean high water line of the Gulf of Mexico.

10. Plaintiff, Stop the Beach Renourishment, Inc., ("STBR") is comprised of persons owning real property along the Gulf of Mexico within the County limits of Walton County, Florida. *See* Exhibit "B" which includes members of STBR.

11. A substantial number of STBR's members (including individual Plaintiffs Alford and Lindsay) own property fronting the Gulf of Mexico such that the boundary of their property is the mean high water line of the Gulf of Mexico.

12. As a result of Flamingo, Ross, Jones, Alford, and Lindsay ("Individual Plaintiffs") owning Gulf-front upland properties to the mean high water line of the Gulf of Mexico, their properties enjoy, contain, and possess littoral (a/k/a riparian) property rights.

13. Likewise, STBR's and SOB's members who own upland properties to the mean high water line of the Gulf of Mexico, enjoy, contain, and possess littoral (a/k/a riparian) property rights.

14. SOB and STBR members who own littoral property have been substantially and adversely affected by the Defendants' Beach Renourishment Project and their actions in furtherance thereof.

15. SOB and STBR members who own littoral property in Walton County and the City of Destin have and will suffer harm specific to themselves and not shared with the public generally.

16. Defendant, TRUSTEES, is an agency of the State of Florida comprised of the Governor, Attorney General, Chief Financial Officer, and Commissioner of Agriculture, headquartered in Tallahassee, Leon County, Florida. The TRUSTEES are charged with the responsibility of managing all state owned lands with the authority to sue and be sued. § 253.02, Fla. Stat.

17. Defendant, DEP, is an agency of the State of Florida headquartered in Tallahassee, Leon County, Florida with the responsibility of carrying out the "Beach and Shore Preservation Act" (§§ 161.011–161.45, Fla. Stat.) ("Act").

18. Defendant, WALTON, is a political subdivision of the State of Florida.

19. Defendant, DESTIN is a Florida Municipal Corporation.

GENERAL ALLEGATIONS

20. At issue in this action is whether Sections 161.141, 161.161 and 161.191, Fla. Stat. (2003) and the Act, are constitutional as they facilitate the physical confiscation of private property without providing landowners due process of law or just and full compensation, through eminent domain proceedings.

21. Alternatively, if the Court finds the sections and Act constitutional, Plaintiffs seek a declaration that constitutionally protected private property rights will be taken by the proposed beach renourishment project which must be acquired by eminent domain proceedings prior to the commencement of any beach renourishment project.

22. DESTIN and WALTON have applied for permits and grants to conduct Beach Restoration along a 6.9 mile stretch of beach (encompassing the properties of the Individual Plaintiffs and SOB/STBR members who own littoral property) pursuant to the "Beach and Shore Preservation Act."

23. Plaintiffs challenge this Act because it physically confiscates constitutionally protected littoral property rights without providing due process of law or just and full compensation.

24. Pursuant to the Act, Defendant DEP issued a "Consolidated Notice of Intent to Issue Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands" to DESTIN and WALTON on July 15, 2004.

25. Pursuant to the Act, once a beach erosion control project is to be undertaken, the TRUSTEES are required to establish an "Erosion Control Line" (ECL).

26. The ECL will "represent the landward extent of the claims of the state in its capacity as sovereign titleholder of the submerged bottoms and shores of the . . . Gulf of Mexico . . . ." § 161.151(2), Fla. Stat.

27. Once the TRUSTEES establish the ECL, the Act purports to vest title to all lands seaward of the ECL with the State regardless of the constitutional property rights to newly created lands by accretion or alluvion possessed by the Individual Plaintiffs and SOB/STBR members who own littoral property. Section 161.191, Fla. Stat., provides, in relevant part:

> (1) Upon the filing of a copy of the board of trustees' resolution and the recording of the survey showing the location of the erosion control line and the area of beach to be pro-

> tected as provided in s. 161.181 title to all lands seaward of the erosion control line shall be deemed to be vested in the state by right of its sovereignty, and title to all lands landward of such line shall be vested in the riparian upland owners whose lands either abut the erosion control line or would have abutted the line if it had been located directly on the line of mean high water on the date the board of trustees' survey was recorded.
>
> (2) Once the erosion control line along any segment of the shoreline has been established in accordance with the provisions of ss. 161.141–161.211, *the common law shall no longer operate to increase or decrease the proportions of any upland property lying landward of such line, either by accretion or erosion or by any other natural or artificial process*, ...

§ 161.191, Fla. Stat. (emphasis added).

28. The Act further states that the addition of sand to the privately owned upland property will automatically become subject to a public easement, without first providing landowners procedural due process of law or just and full compensation.

29. Specifically, Section 161.141, Fla. Stat., provides in part:

> any additions to the upland property landward of the established line of mean high water which result from the restoration project remain the property of the upland owner subject to all governmental regulations and are not to be used to justify increased density or the relocation of the coastal construction con-

> trol line as may be in effect for such upland property. *The resulting additions to upland property are also subject to a public easement for traditional uses of the sandy beach consistent with uses that would have been allowed prior to the need for the restoration project. . .* If an authorized beach restoration, beach nourishment, and erosion control project cannot reasonably be accomplished without the taking of private property, the taking must be made by the requesting authority by eminent domain proceedings.

§ 161.141, Fla. Stat. (emphasis added).

30. The Individual Plaintiffs and SOB/STBR members who own littoral property, as littoral property owners, possess littoral property rights which include *at least* the following vested rights: the right to receive accretions and relictions of property; the right to have their property's contact with the water remain intact; the right to an unobstructed view of the water; and an exclusive right to access the water from their property.

31. Section 161.191, Fla. Stat. – on its face and as-applied by the Defendants – by changing the common law and these vested constitutional property rights unconstitutionally deprives the Individual Plaintiffs and SOB/STBR members who own littoral property of their constitutionally protected littoral property rights without due process of law and just and full compensation under the United States and Florida Constitutions.

32. TRUSTEES' actions in adopting and recording an ECL without first instituting eminent domain proceedings under the Act is an unconstitutional

deprivation of the constitutionally protected littoral property rights of the Individual Plaintiffs and SOB/STBR members who own littoral property without due process and just and full compensation under the United States and Florida Constitutions.

33. The TRUSTEES' have adopted a Resolution dated June 25, 2004 as required by Section 161.161, Fla. Stat., which establishes the "Western Walton County Erosion Control Line."

34. The TRUSTEES' have adopted a Resolution dated December 30, 2004 as required by Section 161.161, Fla. Stat., which establishes the "City of Destin Erosion Control Line."

35. The constitutional property rights of SOB's members who own littoral property, along with Flamingo, Ross, and Jones' are directly affected by the TRUSTEES' adoption of the City of Destin Erosion Control Line ("ECL").

36. The constitutional property rights of STBR's members who own littoral property, along with Alford and Lindsay's constitutional property rights are directly affected by the TRUSTEES' adoption of the Western Walton County Erosion Control Line ("ECL").

37. The City of Destin Erosion Control Line and Western Walton County Erosion Control Line, taken together, form the erosion control line for the 6.9 mile Beach Restoration Project. These two erosion control lines will be referred to collectively as the "ECL."

38. If the Defendants desire to acquire one or more of the littoral property rights from the Individual Plaintiffs and SOB/STBR members who own lit-

toral property, they must do so by instituting eminent domain proceedings.

39. Defendants have not filed any notices or actions for eminent domain for any littoral properties affected by the ECL for the Beach Renourishment Project.

40. Defendants have no intention of filing any eminent domain proceedings to acquire constitutionally protected littoral property rights from the Individual Plaintiffs or SOB/STBR members who own littoral property unless ordered by a court.

COUNT I

DECLARATORY JUDGMENT
The Act, or portions thereof, are Facially Unconstitutional

41. Plaintiffs reallege and incorporate herein by reference the allegations in Paragraphs 1-40 of this Complaint as if fully set forth herein.

42. Under this count, Flamingo, Ross, Jones, Alford, Lindsay, SOB, and STBR (collectively "Plaintiffs" in this Count) seek relief.

43. Section 86.011, Fla. Stat., authorizes a party to file a lawsuit seeking a declaratory judgment from a court when a party is in doubt regarding its rights, powers, and privileges.

44. Individual Plaintiffs and SOB/STBR members who own littoral property are in doubt as to their rights, powers, and privileges with respect to their real property and associated vested littoral rights thereto in light of the Act and the Defendants' Beach Restoration Project.

45. The adoption of the ECL and recordation of the same in accordance with Section 161.181, Fla. Stat., by the TRUSTEES will fix a permanent unnatural boundary between the sovereignty bottom lands and the uplands of the Individual Plaintiffs and SOB/STBR members who own littoral property.

46. As a result of the adoption and upon the recording of the ECL, the Individual Plaintiffs and SOB/STBR members who own littoral property will instantly be divested of their constitutionally protected littoral right to receive accretions (along with other rights) and that right (and title to any accreted lands) will be immediately transferred to the Trustees by operation of law.

47. The Trustees will instantly become record title holder to any accreted lands that, prior to the adoption and recordation of the ECL, would have vested with the Individual Plaintiffs and SOB/STBR members who own littoral property.

48. Sections 161.181 and 161.191, Fla. Stat., and the Act as a whole, constitutes a direct physical taking of the Individual Plaintiffs' littoral property rights (as well as those littoral rights of SOB/STBR members who own littoral property), rather than a "regulatory" taking.

49. Section 161.191, Fla. Stat., purporting to eliminate the constitutionally protected littoral property of the Individual Plaintiffs and SOB/STBR members who own littoral property without first requiring the institution of eminent domain procedures violates the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution and the due process clause of Article I, section 9, of the Florida Constitution.

50. Section 161.191, Fla. Stat., which establishes for all time, the permanent boundary line between privately owned upland properties and sovereign submerged lands is patently unconstitutional.

51. Section 161.191, Fla. Stat., which authorizes a permanent line of demarcation between privately owned uplands and sovereign submerged lands can only pass constitutional muster if it mandates the governmental entity to first institute eminent domain proceedings to acquire the upland owners' constitutionally protected property right of accretion. Neither section 161.191, Fla. Stat., nor any other section of the Act requires the governmental entity to acquire the upland property owners' right to accretion by eminent domain.

52. Consequently, section 161.191, Fla. Stat., and the Act unconstitutionally deprives the Individual Plaintiffs and SOB/STBR members who own littoral property of their littoral property rights without full and just compensation in violation of the due process clause of the Fourteenth Amendment to the United States Constitution and the due process clause of Article I, section 9, of the Florida Constitution.

53. SOB and STBR bring this action on behalf of its substantial number of members that own littoral property within the Beach Renourishment Project.

54. An actual, immediate, substantial, and justiciable controversy exists between the parties as to whether Sections 161.141, 161.161, and 161.191, Fla. Stat., and the Act, are constitutional.

55. Accordingly, Plaintiffs are entitled to have their rights, powers, and privileges determined by this Court and to a declaratory judgment pursuant to Chapter 86, Fla. Stat.

WHEREFORE, Plaintiffs are entitled to a judgment declaring that Sections 161.141, 161.161, and 161.191, Fla. Stat. and the Act, are unconstitutional.

COUNT II

DECLARATORY JUDGMENT
The Act, or Portions thereof, are Unconstitutional as-applied by the Defendants

56. Plaintiffs reallege and incorporate herein by reference the allegations in Paragraphs 1–40 of this Complaint as if fully set forth herein.

57. Under this count, the Individual Plaintiffs seek relief.

58. Section 86.011, Fla. Stat., authorizes a party to file a lawsuit seeking a declaratory judgment from a court when a party is in doubt regarding its rights, powers, and privileges.

59. The Individual Plaintiffs are in doubt as to their rights, powers, and privileges with respect to their real property and associated vested rights thereto in light of the Act and the Defendants' actions and inactions under the Act.

60. Section 161.191, Fla. Stat., eliminating the Individual Plaintiffs' constitutionally protected littoral property rights without providing due process of law or just and full compensation violates the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution and the due process clause of Article I, section 9, of the Florida Constitution.

61. The Trustees have adopted an ECL, pursuant to section 161.161, Fla. Stat., that traverses the Individual Plaintiffs' properties.

62. The adoption of an ECL and recordation of the same in accordance with section 161.181, Fla. Stat., by the TRUSTEES will fix a permanent unnatural boundary between the sovereignty bottom lands and the Individual Plaintiffs' littoral uplands.

63. As a result of the adoption and upon the recording of the ECL, the Individual Plaintiffs will be instantly divested of their constitutionally protected littoral right to receive accretions and that right (and title to any accreted lands) will be immediately transferred to the Trustees by operation of law.

64. The Trustees will instantly become record title holder to any accreted lands that, prior to the adoption and recordation of the ECL, would have vested with the Individual Plaintiffs.

65. Sections 161.181 and 161.191, Fla. Stat., and the Act as a whole, constitutes a direct physical taking of the Individual Plaintiffs' property rights, rather that a "regulatory" taking.

66. As of the date of filing this amended complaint, neither the TRUSTEES, DEP, DESTIN, or WALTON have instituted any eminent domain proceedings against the Individual Plaintiffs or any other littoral property owner within the Beach Renourishment project pursuant to Section 161.141, Fla. Stat., or any other section of the Act.

67. Section 161.141, Fla. Stat., provides: "If an authorized beach restoration, beach nourishment, and erosion control project cannot reasonably be accomplished without the taking of private property, the taking must be made by the requesting authority by eminent domain proceedings."

68. The failure of the TRUSTEES, DEP, CITY and WALTON to institute eminent domain proceed-

ings as required by Section 161.141, Fla. Stat., is a violation of that state statute.

69. By virtue of their actions to establish and record an ECL, as alleged, the TRUSTEES, DEP, CITY and WALTON, interpret and apply section 161.141, Fla. Stat., and the Act in a manner which excuses them from instituting eminent domain proceedings prior to the establishment and recordation of the ECL. This application of section 161.141, Fla. Stat., and the Act to the Individual Plaintiffs' property is unconstitutional.

70. The TRUSTEES' adoption and recordation of the ECL, without first instituting eminent domain proceedings, will take the Individual Plaintiffs' littoral property rights without full and just compensation violating the due process clause of the Fourteenth Amendment to the United States Constitution and the due process clause of Article I, section 9, of the Florida Constitution.

71. An actual controversy exists between the Individual Plaintiffs and Defendants as to whether Sections 161.161, 161.191 and 161.141, Fla. Stat., and the Act, are constitutional and whether Defendants must provide the Individual Plaintiffs with due process in the form of eminent domain proceedings BEFORE the adoption and recordation of the ECL.

72. Accordingly, the Individual Plaintiffs are entitled to have their rights, powers, and privileges determined by this Court and to a declaratory judgment pursuant to Chapter 86, Fla. Stat.

73. The Individual Plaintiffs have complied with all conditions precedent to instituting this action.

74. The Individual Plaintiffs have exhausted all administrative remedies, to the extent any such remedies exist.

WHEREFORE, the Individual Plaintiffs are entitled to a judgment declaring that Sections 161.141, 161.161, and 161.191, Fla. Stat., and the Act, as-applied by the Defendants, are unconstitutional.

COUNT III

DECLARATORY JUDGMENT
The Act requires the Defendants to institute eminent domain proceedings to acquire constitutionally protected property rights prior to recording the ECL

75. Plaintiffs reallege and incorporate herein by reference the allegations in Paragraphs 1–40 of this Complaint as if fully set forth herein.

76. Under this count, Flamingo, Ross, Jones, Alford, Lindsay, SOB, and STBR (collectively "Plaintiffs" in this Count) seek relief.

77. Section 86.011, Fla. Stat., authorizes a party to file a lawsuit seeking a declaratory judgment from a court when a party is in doubt regarding its rights, powers, and privileges.

78. Individual Plaintiffs and SOB/STBR members who own littoral property are in doubt as to their rights, powers, and privileges with respect to their real property and associated vested rights thereto in light of the Act and the Defendants' actions and inactions under the Act.

79. The Act, in section 161.141, Fla. Stat., states "If an authorized beach restoration, beach nourishment, and erosion control project cannot reasonably be accomplished without the taking of private prop-

erty, the taking must be made by the requesting authority by eminent domain proceedings."

80. There is a bona fide dispute between the parties as to whether Section 161.141, Fla. Stat., requires the Defendants, WALTON and CITY, to institute eminent domain proceedings against the Individual Plaintiffs and SOB/STBR members who own littoral property.

81. Sections 161.181 and 161.191, Fla. Stat., of the Act which establishes and authorizes recording of the ECL, expressly confiscates the "private property" (*i.e.*, littoral right to accretion and right to have their littoral property remain in contact with the water) of Individual Plaintiffs and SOB/STBR members who own littoral property.

82. Accordingly, Defendants are required by Section 161.141, Fla. Stat., to first institute eminent domain proceedings prior to recording the ECL.

83. Defendants have not filed any notices or actions for eminent domain for any littoral properties affected by the ECL for the Beach Renourishment Project.

84. Defendants have no intention of filing any eminent domain proceedings to acquire the constitutionally protected property rights of the Individual Plaintiffs and SOB/STBR members who own littoral property unless ordered by a court.

85. Defendants have adopted the ECL and can record the ECL pursuant to Section 161.181, Fla. Stat., at anytime. Upon recording, the Individual Plaintiffs and SOB/STBR members who own littoral property will be immediately, and by express operation of law, divested of their "private property" (*i.e.*,

littoral right to accretion and right to have their littoral property contact the water).

86. Accordingly, Individual Plaintiffs and SOB/STBR members who own littoral property have a bona fide, actual, present, and practical need for a declaration of their rights.

87. SOB and STBR bring this action on behalf of its substantial number of members that own littoral property within the Beach Renourisment Project.

WHEREFORE, Plaintiffs are entitled to a judgment declaring that Sections 161.141, 161.161, 161.191, Fla. Stat., and the Act, requires the Defendants to institute eminent domain proceedings prior to the recordation of the ECL and to the extent the ECL is recorded prior, to the institution of eminent domain proceedings, Section 161.141, Fla. Stat., and the Act are unconstitutional.

Dated this 3rd day of February, 2005.

[Exhibit A to Amended Complaint intentionally omitted from Respondents' Appendix]

EXHIBIT B [to Amended Complaint]
Stop the Beach Renourishment, Inc.'s Members

Lionel and Tammy Alford
20 Sandy Beach Road, Miramar Beach
R 34-2S-21-42000-019-0010[1]

Janet Frost
30 Sandy Beach Road, Miramar Beach
R 34-2S-21-42000-019-0000

---

[1] These numbers are the Walton County Parcel Id numbers.

Slade Lindsay
247 Sand Trap Rd., Miramar Beach
R 34-2S-21-42000-019-0011

Suzy Spence
219 Open Gulf St.(Walton Co property)
R 33-2S-21-42180-003-0020

Mark Styslinger
167 Beach Drive E. (Gulf Pines)
R 34-2S-21-42080-009-0130

RESPONDENT'S BRIEF

(22)

No. 08-1151

In the Supreme Court of the United States

STOP THE BEACH RENOURISHMENT, INC.,
Petitioner,
v.
FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND, WALTON COUNTY, AND CITY OF DESTIN,
Respondents.

On Writ of Certiorari to the Florida Supreme Court

BRIEF OF RESPONDENTS, FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION & BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND

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QUESTIONS PRESENTED

Enacted more than forty years ago, Florida's Beach and Shore Preservation Act authorizes publicly-funded beach restoration projects that protect vulnerable public and private property and infrastructure along critically eroded beaches while preserving and supplementing the common law rights of upland owners of littoral property. The questions presented are:

1. Whether the Florida Supreme Court's decision facially upholding the Act's provisions constitutes a "judicial taking" of private property under the Fifth and Fourteenth Amendments of the United States Constitution.

2. Whether the Act itself is an unconstitutional taking of private property under the federal constitution, a question not passed upon below.

3. Whether the Act provides sufficient procedural due process protections under the federal constitution, a question not raised below.

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STATEMENT OF THE CASE

"The waters of the sea are usually considered a common enemy."[1]

I. Beach Restoration In Florida: Safeguarding Public Welfare While Preserving Private Property Rights.

Florida's beaches dominate its geography.[2] It has the longest coastline of the 48 contiguous states, comprising 1,350 miles of shoreline of which 825 miles are sandy beaches along the Gulf of Mexico and the Atlantic Ocean.[3] These beaches form a vital first line of defense against seasonal storms and hurricanes that endanger coastal areas, where almost 80% of Florida's residents live and work, and threaten damage to billions of dollars of property and infrastructure along Florida's beach and dunes system. [Joint Appendix ("JA") 74][4] The beaches also

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[1] *Paty v. Town of Palm Beach*, 29 So. 2d 363, 363 (Fla. 1947).

[2] *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 75 (Fla. 1974) ("No part of Florida is more exclusively hers, nor more properly utilized by her people, than her beaches.").

[3] *See Florida Shoreline Length Information* (Dec. 1993), http://www.dep.state.fl.us/beaches/publications/pdf/fl_beach.pdf (221 miles are in Florida's panhandle and 25.6 are in Walton County).

[4] *Economics of Beach Tourism in Florida*, Ctr. for Urban & Environ. Solutions, Fla. Atlantic Univ. (July 2005), http://www.dep.state.fl.us/beaches/publications/pdf/phase2.pdf.; (Continued ...)

form the cornerstone of the state's biggest industry: tourism. *Id.* Beach-related tourism creates 500,000 jobs and also generates billions of dollars for Florida's economy annually. [JA 74][5] Florida's beaches also support a variety of endangered plant and animal habitats and "represent one of the most valuable natural resources of Florida." Fla. Stat. § 161.053(1)(a) (2004); [JA 74].

Under Florida's public trust doctrine, state-owned tidal lands are held in "trust for all the people." Fla. Const. art. X, § 11. The legal boundary between the state-owned tidal lands and the bordering upland properties is generally a dynamic mean high water line (MHWL) that moves inland due to erosion or seaward where land forms gradually and imperceptibly via accretion.[6] The legal boundary line does not change, however, when a sudden change to the shoreline occurs (avulsion). *See Bryant v. Peppe*,

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Fla. Stat. §§ 161.088, 161.091(3) (2004) (noting the beaches' critical importance to Florida's welfare and economy).

[5] *See Economics of Beach Tourism*, *supra* note 4.

[6] The existing MHWL bordering the navigable water is the boundary line between private upland property and sovereign lands. Fla. Stat. § 177.28(1). "Mean high water" means the average height of the high waters over a 19-year period. *See* Fla. Stat. § 177.27(14). "MHWL" means the intersection of the tidal plane of mean high water with the shore. *See* Fla. Stat. § 177.27(15); *see also Borax Consol. v. City of Los Angeles*, 296 U.S. 10, 26-27 (1935) (discussing same). The MHWL is a dynamic interface of land and water due to waves, currents, tides, water levels, and meteorological conditions that alter the contours of the sea bottom and coastlines.

238 So. 2d 836, 838 (Fla. 1970) (state did not lose title to sovereign submerged lands that suddenly emerged as dry land after a storm); *Martin v. Busch*, 112 So. 274, 287 (Fla. 1927) (affirming state ownership of land that emerges due to government drainage operation). Avulsive changes may sever upland riparian[7] or littoral properties' physical contact with the water, but the upland properties retain their riparian or littoral character. *Id.*

Florida law, for almost a century, has recognized that the state may retain new dry lands arising in the course of a public project that were previously submerged sovereign lands, even if an upland property's physical contact with the water's edge is broken. *Id.* No compensable claim arises absent a material impairment of littoral rights of access, view, or use. *See, e.g., Duval Eng'g & Contracting Co. v. Sales*, 77 So. 2d 431 (Fla. 1954) (no compensable claim where bridge project slightly impaired littoral rights, but did not materially disturb littoral rights of access and view); *Paty*, 29 So. 2d at 363 (no compensation to oceanfront property owner for effects of a state project).

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[7] The terms riparian (relating to river or stream) and littoral (relating to coast or shore of ocean or sea) are generally used interchangeably in this brief. *See* [PA 3 n.3 (discussing meanings of riparian and littoral)]

A. Florida's Beach and Shore Preservation Act Combats Beach Erosion and Protects Beachfront Property Rights.

Florida long ago made it a major state priority to protect and restore critically eroded beaches through legislation that is extraordinarily protective of private property. In 1965 its legislature first enacted the Beach and Shore Preservation Act ("Act") to preserve and protect the state's public and private lands, its economy, and its general welfare. 1965 Fla. Laws, ch. 65-408. Soon thereafter, in 1970 the legislature enacted the Act's core provisions [App 1a-11a], which remain virtually unchanged today, due to beach erosion reaching a crisis level and posing a "serious menace to the economy and general welfare of the people of this State." 1970 Fla. Laws, ch. 70-276, §1 (codified, in substantial part, at Fla. Stat. § 161.088). Florida has since restored about 198 miles of sand beaches on its Gulf and Atlantic coasts via 60 major projects that remain actively managed.[8] The 1970 revisions codified Florida's commitment to preserving beaches and protecting private property rights in two significant ways, both consistent with Florida's common law, as the next sections discuss.

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[8] *See Strategic Beach Mgmt. Plan*, 6, 8 (Fla. Dep't of Envtl. Prot., May 2008), *available at* http://www.dep.state.fl.us/beaches/-publications/pdf/SBMP/Cover%20and%20Introduction.pdf (last visited Sept. 25, 2009).

1. The Act establishes a fixed boundary, the erosion control line ("ECL"), which protects upland owners from the loss of property due to future erosion.

First, the 1970 Act declared the need to fix a property boundary for restoration and nourishment projects along critically eroded[9] beaches between private uplands and state lands in order to clarify "proper claims and legitimate uses by both the State and private upland owners of lands created[.]" 1970 Fla. Laws, ch. 70-276 (Whereas clause). Section 2 defined the fixed line, known as an "erosion control line" ("ECL"), which reflected the landward extent of the state's common law ownership to pre-project submerged bottoms and shores. *Id.* at § 2(3).

---

[9] "Critically Eroded Shoreline" is defined currently as:

> a segment of shoreline where natural processes or human activities have caused, or contributed to, erosion and recession of the beach and dune system to such a degree that upland development, recreational interests, wildlife habitat or important cultural resources are threatened or lost. Critically eroded shoreline may also include adjacent segments or gaps between identified critical erosion areas which, although they may be stable or slightly erosional now, their inclusion is necessary for continuity of management of the coastal system or for the design integrity of adjacent beach management projects.

See Fla. Admin. Code r. 62B-36.002(4).

The legislature ensured that the ECL would continue to reflect the pre-project, common law property boundary for the life of the project after sand was deposited on sovereign submerged land:

> Once the [ECL] along any segment of the shoreline has been established in accordance with the provisions of this act, *the common law shall no longer operate to increase or decrease the proportions of any upland property lying landward of such line, either by accretion or erosion* or by any other natural or artificial process, except as provided in Section 8(b) and (c) of this act.

Id. at § 6(b) (emphasis added) (Fla. Stat. § 161.191(2)). By adopting a fixed property boundary for restoration projects, the Act eliminated the vagaries of coastal dynamics that caused boundaries to shift due to erosion (loss of upland property) or accretion (gradual and imperceptible gain of property seaward), a substantial benefit to upland owners who live on a critically eroding beach. Indeed, the "whole purpose of the beach restoration is to provide protection to the upland properties." [JA 76]

The following diagram illustrates these concepts in a typical beach restoration project:

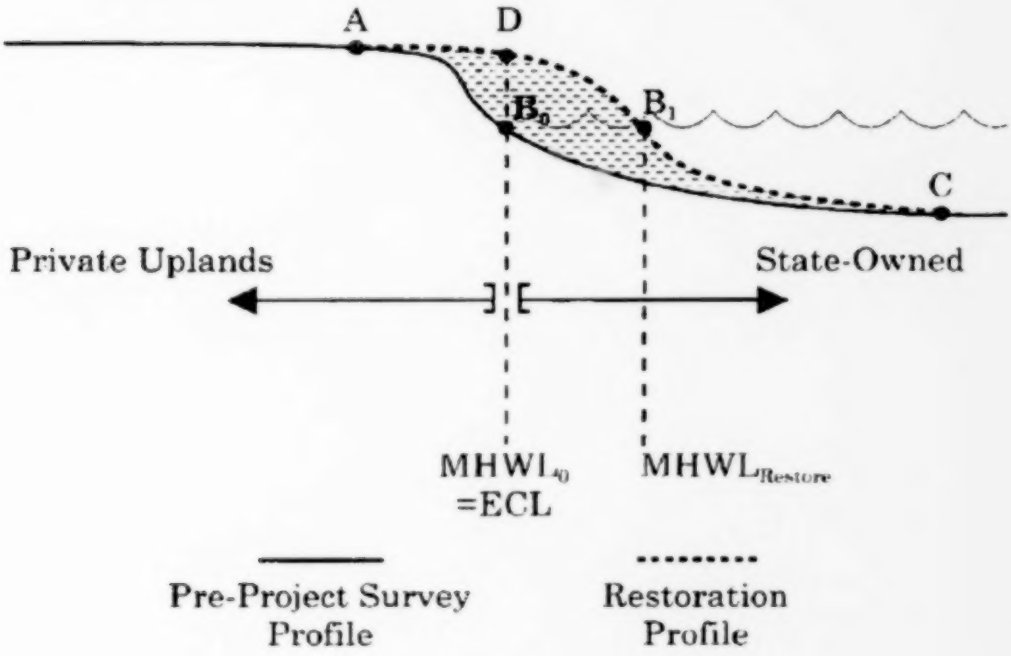

Figure 1

Figure 1 shows a pre-restoration critically-eroded beach profile (depicted as AB_0C). Under the Act, a survey is conducted to locate the pre-project mean high water line ("$MHWL_0$"), which separates private uplands from sovereign property at the pre-project point where tidal waters and the land meet (represented as B_0). The Act requires that the Board of Trustees of the Internal Improvement Trust Fund (the "Board") follow the existing, pre-project MHWL in setting the ECL, unless engineering or other

requirements dictate otherwise.[10] As is typical, the surveyed MHWL became the ECL in this case. [JA 53, 88][11]

During the project, sand is pumped into the restoration area primarily on the state-owned side of the ECL,[12] restoring the beach and creating a

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[10] Fla. Stat. § 161.141; Fla. Stat. § 161.161(5) ("the board of trustees shall be guided by the existing line of mean high water, bearing in mind the requirements of proper engineering in the beach restoration project, the extent to which erosion or avulsion has occurred, and *the need to protect existing ownership of as much upland as is reasonably possible*." (emphasis added)); *see also* [JA 261 (sheet 7 of 9) (showing the existing MHWL (ECL) for the project (marked in orange)]. The Act provides for eminent domain proceedings if setting the ECL effects an ouster or transfer of existing private land to public ownership (e.g., where ECL must be set landward of prevailing MHWL due to engineering requirements). *See* Fla. Stat § 161.141.

[11] *See Wallace Corp. v. City of Miami Beach*, 793 So. 2d 1134, 1136 (Fla. Dist. Ct. App. 2001) (ECL "is located along the mean high water line prior to beach restoration."). A property owner may challenge the proposed location of the ECL prior to its recordation, a challenge that STBR abandoned after storms caused additional erosion resulting in further landward movement of the MHWL from B_0. [JA 53, 187, 200]

[12] In this case, as is typical, sand was also added to the private uplands side of the ECL, depicted as area ADB_0, which became the property of upland owners at no cost. [JA 261 (sheet 7) (marking the ECL (orange) and upland extent of the project (pink))]; Fla. Stat. § 161.141. Because additional erosion occurred *after* the ECL was established in this case, extra sand was placed landward of B_0 that benefitted upland owners disproportionately compared to the typical restoration project. STBR's members have not made any taking claims in this litigation related to the placement of sand on their upland properties.

protective "sacrificial sand" buffer (depicted as the shaded area in Figure 1) that is designed to protect both the shoreline and upland properties for about 6-8 years until future erosion gradually consumes it. [JA 81][13] The point B_1 is where it is expected that the high water line will contact the newly-created shoreline ($MHWL_{Restore}$). Public use of the state-owned beach (DB_1) must be consistent with pre-project uses and is subject to additional protections that the Act affords to owners of littoral properties, as the next section discusses. *See* Fla. Stat. § 161.141.

2. The Act protects and preserves existing littoral rights and creates additional statutory rights for owners of littoral property.

Second, the 1970 Act specifically preserved and supplemented the common law littoral rights of upland owners whose properties, by operation of the Act, now extend to the ECL rather than the MHWL. Its preservation of littoral rights, and its additional statutory protections, both remain on the books today reflecting ten substantial levels of protection.

First, the 1970 Act explicitly provided that upland owners whose properties abut the ECL

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[13] *See Hillsboro Island House Condo. Apartments, Inc. v. Town of Hillsboro Beach*, 263 So. 2d 209, 212 (Fla. 1972) ("effective treatment of the problem [under the Act] requires the deposit of sands onto the beach shelf seaward beyond the ordinary low water mark. Piling sand only within the Town boundary would be to ignore the mechanics of erosion and invite failure.").

"continue to be entitled to all common law riparian rights of the uplands except as otherwise provided in Section 6(b) hereof [discussed *supra*], including but not limited to rights of ingress, egress, view, boating, bathing and fishing." 1970 Fla. Laws, ch. 70-276, § 7 (Fla. Stat. § 161.201 (entitled "Preservation of common-law rights")). The legislature did not extinguish existing littoral rights and reenact them as statutory protections; instead, it provided that any upland owner (or lessee) "who by operation of this act ceases to be a holder of title to the mean high water line shall, nonetheless, continue to be entitled to all common law riparian rights" as just outlined. *Id.* (emphasis added). Thus, by law, the properties of upland owners along the ECL retain essential waterfront characteristics with appurtenant common-law riparian rights (excepting only the possible increase or decrease of upland property from the ECL via future accretion or erosion in Section 6(b)).[14]

Second, by fixing the ECL at the existing pre-project MHWL, the private uplands remain privately owned and are not transformed into a state-owned public beach. Nothing in the Act changes the rights of private upland owners to their pre-existing parcel of

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[14] *See* Fla. Stat. § 161.191(1) (1970 Fla. Laws, ch. 70-276, § 6(a)) (after ECL recorded "title to all lands landward of such line shall be vested in the *riparian upland owners* whose lands either abut the erosion control line or would have abutted the line if it had been located directly on" the MWHL on the date survey recorded) (emphasis added).

land; none is physically taken; none is subjected to different or inconsistent uses.[15]

Third, fixing the ECL at the MHWL provides an enormous benefit to upland owners, who, during the project life, will bear no risk of loss due to erosion.[16]

Fourth, beyond preserving common law littoral rights, the Act prohibits any structures other than those required to prevent erosion on the state-owned portion (i.e., DB_1 in Figure 1):

> [T]he state shall not allow any structure to be erected upon lands created, either naturally or artificially, seaward of any erosion control line ..., except such structures required for the prevention of erosion.

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[15] *See* Fla. Stat. § 161.141 (1970 Fla. Laws, ch. 70-276, § 1) (stating "there is no intention on the part of the State to extend its claims to lands not already held by it or to deprive any upland or submerged land owner of the legitimate and constitutional use and enjoyment of his or her property"); *id.* (additions to upland property are "subject to a public easement for traditional uses of the sandy beach consistent with uses that would have been allowed prior to the need for the restoration project.").

[16] *See Hillsboro Island*, 263 So. 2d at 213 (beach restoration under Act goes beyond repair, extending the public beach 75 feet seaward "to adapt the beach itself as a means of averting erosion damage" while "enhanc[ing] its utility and beauty[.]").

Fla. Stat. § 161.201 (1970 Fla. Laws, ch. 70-276, § 7). By restricting structures, the Act supplements the common law rights of access, use, and view, further preserving the waterfront characteristics of uplands.

Fifth, the Act prohibits uses that would injure an upland owner and his business and property, or to the "person, business or property" of a lessee of the upland property. The Act states:

> Neither shall such use be permitted by the state as may be injurious to the person, business, or property of the upland owner or lessee; and the several municipalities, counties and special districts are [also][17] authorized and directed to enforce this provision through the exercise of their respective police powers.

Id. The Act thereby enlists state and local governmental powers to enforce its protections[18] against injurious uses and supplements the ability of

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[17] Section 7 of chapter 70-276 is identical to the current statute, but originally contained the word "also" as indicated in brackets; no subsequent legislation eliminated this word, which appears to have been inadvertently omitted.

[18] *See, e.g., Hillsboro Island*, 263 So. 2d at 212 (noting that "even though a substantial portion of the improved beach will be within the domain of the sovereign, under s 161.201, F.S.A., the Town will exercise its police powers over this improved area.").

local governments to regulate beach-related activities.[19]

Sixth, the width of the state-owned beach (i.e., DB_1 in Figure 1), which forms the primary buffer necessary for erosion control, is limited to the width set forth in the restoration project survey:

> ... the state shall not extend, or permit to be extended through artificial means, that portion of the protected beach lying seaward of the erosion control line beyond the limits set forth in the survey recorded by the board of trustees *unless the state first obtains the written consent of all riparian upland owners whose view or access to the water's edge would be altered or impaired.*

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[19] In addition, Walton County regulates and places limits on vending activities including those that involve "water based activities" that are defined in its Code. *See* Walton County Code, §§ 22-42.A, 22-51 (2009). The Code makes no mention of permitting a "park" of such activities on the state-owned beach as STBR suggests. [Pet. Br. 55] To the contrary, the Code places significant regulations on all vending and related activities that involve use of the public beach. *See generally id.* at ch. 22. Those that involve "water based activities" are the most strictly regulated. *See id.* at § 22-60 ("Beach Vendors") (requiring that vendors of water-based activity operations have, inter alia, "an operations center located at a land-based location with direct access to the beach in the immediate area where the vending services are being provided for public use" as well as "a motorized chase boat or personalized watercraft in good running condition in the water" that meets "all U.S. Coast Guard safety requirements.").

Fla. Stat. § 161.191(2) (emphasis added) (1970 Fla. Laws, ch. 70-276 § 6(b)). As the emphasized language highlights, the width may not be extended without all affected upland owners' consent.[20]

Seventh, the Act sets forth remedies that may apply if a project is not commenced timely or commences but halts;[21] is completed but not maintained, so that the shoreline moves landward of

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[20] The Florida Supreme Court below, acknowledging that the restored beach might "be wider than the typical foreshore," specifically stated that *"the State is not free to unreasonably distance the upland property from the water by creating as much dry land between upland property and the water as it pleases*. There is a point where such a separation would materially and substantially impair the upland owner's access, thereby resulting in an unconstitutional taking of littoral rights." [Petition Appendix ("PA") 38 n.16] The Court relied on cases that it had summarized earlier. *Game & Fresh Water Fish Comm'n v. Lake Islands, Ltd.*, 407 So. 2d 189 (Fla. 1981) (boating regulation unconstitutionally denied littoral right of access); *see also Webb v. Giddens*, 82 So. 2d 743 (Fla. 1955) (culvert substantially impaired littoral right of access); *cf. Duval Eng'g & Contracting*, 77 So. 2d 431 (no compensable claim where only a slight impairment of littoral rights existed and owners did not show a material disturbance of the littoral rights of access and view). [PA 18]

[21] Fla. Stat. § 161.211(1) (1970 Fla. Laws, ch. 70-276, § 8(a)) (requiring Trustees to cancel and vacate an ECL if a project is not commenced within 2 years of the Trustees' survey or if construction commences but is halted for more than 6 months from commencement).

the ECL;[22] or is completed but a substantial portion of the shoreline moves landward of the ECL.[23]

Eighth, the Act provides that, if a project cannot "reasonably be accomplished without the taking of private property, the taking must be made by the requesting authority by eminent domain proceedings." Fla. Stat. § 161.141 (1970 Fla. Laws, ch. 70-276, § 1). This protection provides a remedy, for example, where it is necessary for engineering reasons to place the ECL landward of the existing MHWL, resulting in the physical taking of a portion of an upland owner's existing property.

Ninth, the Act provides enormous publicly-funded benefits to upland owners in the form of erosion and storm surge protection.[24] Post-project, the

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[22] Fla. Stat. § 161.211(2) (1970 Fla. Laws, ch. 70-276, § 8(b)) (if the agency "charged with the responsibility of maintaining the restored beach fails to maintain the same and as a result thereof the shoreline gradually recedes to a point or points landward of the [ECL], ... s. 161.191(2) shall cease to be operative as to the affected upland.").

[23] Fla. Stat. § 161.211(3) (1970 Fla. Laws, ch. 70-276, § 8(c)) (providing for cancellation of the survey and voiding the ECL if a substantial portion of the restored project recedes landward of the ECL).

[24] The Florida Legislature has appropriated $582 million (through 2006) for beach erosion control activities and hurricane recovery. Beach Erosion Control Program, http://www.dep.state.fl.us/beaches/programs/becherosn.htm (last visited Sept. 25, 2009); Fla. Stat. § 161.101(1) (dividing beach restoration and subsequent maintenance project costs between local governments and state). In many cases (such as this one), (Continued ...)

upland property is now protected by a substantial buffer of sand, depicted as the shaded area in Figure 1. The so-called "sacrificial sand" on state-owned property provides the first barrier against the sea's intrusion. The upland owner also has a fully-restored and aesthetically-desirable[25] dry sand beach, which the local government sponsor is responsible to maintain throughout the project life. The benefits – at no cost to upland owners in this case – are obviously substantial.[26]

Finally, the legislature provided for procedural protections, including notice and public hearings on the need for projects and the establishment of the ECL.[27]

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owners are not required to pay assessments or make special contributions to defray project costs.

[25] Sand quality must be consistent with existing sand in the area. [JA 132-37]; Fla. Stat. § 161.144.

[26] Local governments may seek state funds, provided the beach to be restored is critically eroded (as here) [JA 76] and the local sponsor agrees to maintain the project for a period of not less than 10 years. *See* Fla. Stat. § 161.151(4). In this case, the project's initial estimated agreed total costs were $15,361,285 consisting of $4,173,661 of state funds and $11,187,624 of local funds. Admin. Hearing Jt. Ex. 1, Part 6 ("Grant Agreement DEP Contract No: 04WL1," at 2).

[27] *See* Fla. Stat. § 161.161 ("Procedures for Approval of Projects") (1970 Fla. Laws, ch. 70-276, § 3) (notice by publication and via mail to affected riparian owners; public hearing for receiving evidence on merits of ECL); Fla. Stat. § 161.181 (contemplating legal challenges to ECL involving boundary disputes that are determined, not by the Board, but in circuit court under Fla. Stat. § 26.012(2)(g) (giving circuit courts original jurisdiction (Continued ...)

3. The Act's establishment of an ECL is consistent with Florida's common law regarding artificial changes to boundaries from avulsive events.

The establishment of an ECL and the preservation of littoral rights of owners of upland properties along a beach restoration project are in harmony with Florida's common law, which provides that the state retains title to its submerged lands that emerge or materialize, whether by natural or artificial means, in a perceptible or intended way via avulsion.

In *Martin v. Busch*, a government drainage project at Lake Okeechobee caused water levels noticeably to drop, uncovering sovereign submerged lands abutting private uplands. An upland owner, whose property no longer had direct physical contact with the water, sought title to the new dry land. The Florida Supreme Court, however, held that title to the

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over "all actions involving the title and boundaries of real property.")). Challenges based on claims that a project area is not critically eroded, or alleged deficiencies in a pre-project MHWL survey, may be presented at the public hearing or following the Board's adoption of the resolution establishing the ECL, and presented via a petition for administrative hearing under Florida's Administrative Procedures Act with appeal to a district court (as occurred here). *See* Fla. Stat. §§ 120.569, 120.57 (Florida's APA). Absent an appeal or a judicial order preventing establishment of the ECL and/or a project from moving forward, the ECL is thereafter filed in the public records with a survey of the beach to be restored and the location of the ECL. Fla. Stat. § 161.181 (1970 Fla. Laws, ch. 70-276, §§ 5 & 6).

formerly submerged lands remained with the state, and that the doctrine of reliction (water receding naturally and imperceptibly) does not apply, *Martin*, 112 So. at 287, and that upland properties retained their riparian characteristics and rights. *See Bd. of Trs. of the Internal Imp. Trust Fund v. Sand Key Assocs., Ltd.*, 512 So. 2d 934, 940-41 (Fla. 1987) (rejecting argument that *Martin* divested riparian owners of their property's waterfront characteristics).

The Act parallels *Martin* by vesting title in the state to the new artificially-created sand beach seaward of the ECL over formerly submerged state tidal lands while retaining the riparian rights of owners of upland properties. This result is similar to *Bryant v. Peppe*, 238 So. 2d 836, in which the Florida Supreme Court rejected the dueling claims of waterfront property owners who sought title to a "narrow strip of land" that emerged over previously submerged lands in the wake of a hurricane. The Court noted that the result is the same whether the new lands are created artificially by a government works project as in *Martin* or naturally and suddenly by a seasonal storm:

> The particular parcel here in question was originally sovereignty land; and it did not lose that character merely because, by avulsion, it became dry land. *See Martin v. Busch*, ... which is somewhat similar to the instant case. There, the avulsion resulting in the water bottom becoming dry was artificially rather than naturally created, resulting from a drainage project undertaken

> by the state. The court noted that, when the water receded suddenly, the "title to such lands, which remained in the state just as it was when covered by the lake. The riparian rights doctrine of accretion and reliction does not apply to such lands."

Id. at 838 (citation omitted) (quote from concurrence). As in *Martin*, as confirmed by *Bryant*, the new strip of land created over the submerged portion of state lands via a beach restoration project under the Act remains the state's property due to the purposive and perceptible nature of its creation (versus accretion, which by its gradual, imperceptible nature is inapplicable).

II. The Walton County Beach Restoration Project.

A. Seasonal Storms and Hurricanes Critically Erode the Beach Causing the City and County to Pursue Beach Restoration.

Erosion has been a serious problem along Florida beaches for a number of decades, resulting in a gradual loss of uplands.[28] Florida's panhandle is no

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[28] *See* Ann F. Johnson & Michael G. Balbour, *Dunes and Maritime Forests, in Ecosytem of Florida* 437 (Ronald L. Myers & John J. Ewel eds., 1990) ("Over the last several decades most of the Florida coast has been eroding landward at an average rate of 0.3-0.6 m/yr. Accretion has been parallel to the coast or at (Continued ...)

exception. Over the years, a succession of seasonal storms and hurricanes decimated shorelines in the panhandle, causing the state to designate some beaches as "critically eroded" and a threat to upland properties and resources, both public and private. [JA 73]

For example, Hurricane Opal, which struck the Florida panhandle on October 4, 1995, was "one of the most severe hurricanes to impact Florida this century ... caus[ing] more structural damage along the Florida coast than all hurricanes and tropical storms combined since 1975."[29] The impact on Walton County was "severe county-wide."[30] Unlike other portions of the panhandle, "Walton County does not have a barrier island" along its coast; instead, it is "characterized by a mainland beach backed by very high dunes[.]"[31] For this reason, Opal's storm surge caused "excessively high wave uprush limits" across Walton County's entire shorefront, reaching up to

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the downdrift ends of barrier islands or capes, rather than seaward." (citations omitted)).

[29] *See Hurricane Opal: Beach and Dune Erosion and Structural Damage Along Panhandle Coast of Fla.*, Rep. No. BCS-98-01, 1, (Fla. Dep't of Envtl. Prot., Jan. 1998), *available at* http://bcs.dep.state.fl.us/reports/opal-rpt.pdf (last visited Sept. 25, 2009).

[30] *Id.* at D-10.

[31] *Id.*

elevations of 20 feet, destroying 100 homes and buildings, and other structures along the beach.[32]

Notably, "[o]ne of the worst hit areas was a half mile segment near the west end of the county between R13 and R16," which is in the same area where STBR's member properties are located.[33] Indeed, the state's storm report noted significant damage "near Sand Trap Road" immediately next to where three STBR members live as reflected on the highlighted map in the Joint Appendix.[34]

This critical and ongoing problem caused Walton County to begin the "long multi-year process of doing the necessary studies and designing construction" [JA 76] to pursue restoration of its beaches. [Petition Appendix ("PA") 4 n.4; JA 30, 53, 84, 107, 157, 163-64, 187, 195, 200] On July 30, 2003, the City of Destin and Walton County filed a joint application with the Florida Department of Environmental Protection ("DEP") to conduct a beach

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[32] *Id.* at D-13. Photographs of the severe erosion as well as structural damage are at pages 8, 37-38, and 44.

[33] *Id.* at D-10.

[34] *Id.*; *see* [JA 261 (sheet 7 of 9) (this map identifies the Slade parcel (#217), the Alford parcel (#218), and the Frost parcel (#219) immediately adjacent to Sand Trap Road and within 500 feet of Tang O Mar; the public access corridor is parcel #216 where Sand Trap Road ends near the beach; the Spence Family Trust parcel (#207) is about 900 feet west of these properties; the Styslinger parcel is about 2/3 of a mile east of this area on sheet 8 of 9) [JA 261 (*see* sheet 1 for project overview map)]; *see also* [JA 207 (testimony of Lindsey's Sand Trap address)]

restoration project to place sand along 6.9 miles of shoreline bordered by more than 450 parcels of primarily private upland property interspersed with a number of city- and county-owned public access corridors and other land. [JA 28, 192, 202, 261]

To determine the MHWL for the restoration area and other dimensions of the construction project, the applicants completed a shoreline survey in 2003 upon which the Board subsequently located the ECL. [JA 32, 88, 217-222] In July 2004, DEP issued its Notice of Intent to Issue a Joint Coastal Permit authorizing the project. [JA 27][35] The Walton County segment of the project ultimately began on February 5, 2006, and was completed on January 19, 2007, while this case was pending on appeal.[36]

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[35] The Joint Coastal Permit includes two separate permits and an authorization, including a coastal construction permit (*see* Fla. Stat. § 161.041 & Fla. Admin. Code r. 62B-41), a wetland environmental resource permit (*see* Fla. Stat. ch. 373, & Fla. Admin. Code r. 62-312), and a proprietary authorization to use sovereign submerged lands (*see* Fla. Stat. § 253.77; Fla. Admin. Code r. 18-21.00401, 18-21.0051, 62-312.065). [JA 27-40]

[36] Notably, the contractor building the restoration project did not place sand in front of the Alford, Slade and Frost properties due to their objections, but did place sand in front of the Spence and Styslinger properties. [JA 276-278] No objection by Spence appeared in the record, and whether Styslinger objected is not clearly reflected in the record. *Id.* Thus, STBR's claim of alleged trespassing upon these two members' property is unsupported on this record. [Pet. Br. 12 n.9, 33]

B. After Hurricane Ivan, STBR Limits Its Administrative Challenge.

On August 10, 2004, STBR (challenging the Walton County portion of the project) and another group (Save Our Beaches, Inc.)[37] (challenging the Destin portion of the project), filed petitions challenging DEP's issuance of the Joint Coastal Permit and requesting formal administrative proceedings pursuant to various Act provisions and regulations. [JA 10, 25][38] STBR initially asserted thirty-eight disputed issues of fact and later added a second petition challenging the ECL under the Act. [JA 14-19, 42]

On September 16, 2004, however, Hurricane Ivan struck, which was "one of the most impactive and destructive hurricanes to Florida's Panhandle coast in recorded history and the most severe since Hurricane Opal in 1995."[39] Ivan's impact was most

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[37] The ALJ held that SOB lacked associational standing, a conclusion that was subsequently adopted in DEP's Final Order, and not appealed. [PA 74]

[38] Few affected property owners apparently objected to the project. [JA 275-79]; *see also* Liza Martin, *Sandtrap Neighbors Upset Over Halt in Beach Project*, The Destin (Fla.) Log, Apr. 15, 2006, *available at* http://www.redorbit.com-/news/display/?id=473008 (last visited Sept. 25, 2009) (reporting neighbors' concerns about protecting upland property that objectors had put "in jeopardy").

[39] *See Hurricane Ivan: Beach and Dune Erosion and Structural Damage Assessment and Post-Recovery Plan for the Panhandle Coast of Fla.*, 1 (Fla. Dep't of Envtl. Prot., Oct. 2004), *available at*

(Continued ...)

severe west of Walton County, but Walton County again "sustained major beach erosion impact" as well as "moderate structural damage" along its entire coast.[40] Indeed, the "entire coast of Walton County sustained major beach and dune erosion" causing the areas in which the properties of STBR members are located to be deemed "particularly vulnerable to further damages" due to their "proximity to eroded bluff lines."[41] The notion that property along the Walton County beaches, including where STBR members live, was somehow immune from severe erosion and its effects, and that houses "sat on an accreting beach," lacks any supporting evidence.[42]

After Ivan further eroded area beaches, STBR substantially amended and shortened its petition [JA 52], abandoning challenges to "technical aspects" of the Joint Coastal Permit including the critically eroded character of the shoreline proposed to be

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http://bcs.dep.state.fl.us/reports/ivan.pdf (last visited Sept. 25, 2009).

[40] *Id.* at 28.

[41] *Id.*

[42] *Compare* [JA 30, 53, 84, 107, 157, 163-64, 187, 195, & 200] *with* [Pet. Br. at 6 (claiming an accreting beach with plentiful sand and dunes prior to project)]; *see also* U.S. Geological Survey, http://coastal.er.usgs.gov/hurricanes/dennis2005/photosets/location17.html (last visited Sept. 25, 2009) (showing Destin hotel property and pool lost to erosion pre- and post-Ivan & Dennis); *id.* (location 19), http://coastal.er.usgs.gov/hurricanes/-dennis2005/photosets/location19.html (last visited Sept. 25, 2009) (showing erosion pre- and post-Ivan & Dennis within the Walton County project area).

restored and *the location of the ECL*. [JA 52-63] It substituted only the following claims: whether "turbidity"[43] standards would be met; whether the project would deny upland owners' use and enjoyment of their properties; whether the project would result in a "taking"; and whether the local sponsors had obtained requisite property rights to implement the project. [JA 61]

STBR claimed that its six members owned five beachfront parcels in the area of the project, but proffered no deeds or other property records; STBR itself made no claim to own property. [JA 60, 210; PA 73] STBR asserted that the project would impair riparian rights, particularly, the rights to "future accretions" and "to access the water." [JA 60] It did not seek a ruling on a constitutional "takings" claim (Florida ALJs may not decide constitutional claims), but filed a separate, parallel lawsuit in circuit court challenging the constitutionality of the Act.[44] [JA 274]

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[43] "Turbidity" means "a condition in water or wastewater caused by the presence of suspended matter, resulting in the scattering and absorption of light rays, as determined using approved methods." Fla. Admin. Code r. 62-610.200(66).

[44] In the circuit court case, *Save Our Beaches, et al. v. Bd. of Trustees, et al.*, 2004-CA-2093 (Fla. Cir. Ct.) (held in abeyance since June 21, 2007), STBR alleges the Act violates federal and state due process standards facially (Count I) and as-applied (Count II). On July 20, 2005, the court denied cross motions for summary judgment, refusing to make "a sweeping pronouncement on the constitutionality of a complex statutory scheme of first judicial impression on an inadequate factual record." Order Den. Cross Mots. Summ. J. at 22. The court noted that the "plaintiffs extrapolate from [the *Sand Key*] decision as to (Continued ...)

The formal administrative process addressed only two permit-related issues: (1) whether Walton County/City of Destin had provided adequate assurances regarding water turbidity standards, and (2) whether Walton County/City of Destin needed to show adequate upland interest to sponsor the project or were covered by an administrative rule exempting them if the project does "not unreasonably infringe on riparian rights." [JA 68]; *see* Fla. Admin. Code r. 18-21.004(3)(b).

As to the first issue, the ALJ concluded in his recommended order, which DEP later adopted as part of its Final Order, [PA 99] that Walton County/City of Destin had provided adequate water turbidity assurances and this finding was not appealed. [PA 120] With respect to the second issue, the ALJ determined that the project activities would not unreasonably infringe on riparian rights. [PA 127-28] This second issue formed the basis of this ensuing litigation.

At the administrative hearing, DEP, Walton County, and Destin presented testimony about project

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the disposition of existing property to the circumstance here - an inchoate interest that may never materialize." *Id.* It also noted that language from *Sand Key* was "substantially oversold by the plaintiffs, at least on this record. Title is not necessarily vested in them because it is undisputed that no additional lands have been created by accretion or reliction. Whether the future possibility of such additional lands is anything more than purely speculative is not resolved on this record." *Id.* at 14 n.6.

related details and the operation of the Act. [JA 66] A DEP environmental manager testified about the value and benefits of beach preservation efforts; the mechanics of the permit process and analysis; the state's goal of ensuring that the mean high water and wave energies that cause erosion are moved away from upland homes, infrastructure, and coastal or recreational resources threatened by erosion; and, how much "sacrificial" sand was needed for a buffer, with a life expectancy of 6-8 years. [JA 76-81] DEP's administrator for permitting environmental programs testified that the project area is "significantly eroding" and that tidal waterfront property – unlike a freshwater lake or river – does not invariably touch the water. [JA 163]

STBR called one witness, Mr. Slade Lindsey, who testified that the project would adversely affect members' riparian rights with respect to turbidity in the water impacting their use of beach areas for swimming, snorkeling, boating, and regular enjoyment; accretion rights, and having his property not "touch[ing] the water's edge." [JA 211, 224] Mr. Lindsey acknowledged the project would add "50 to 80 feet" of "dry sandy beach" between his property line and the water, but expressed no concern with prospective public use of the beach. [JA 223]

STBR presented no evidence of the nature of its members' property interests, such as when their properties were acquired,[45] the extent of the public's

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[45] STBR's members acquired their properties within the last 15 years. *See* Walton County Property Appraiser, Record Search, (Continued ...)

pre-project use and County maintenance of the dry sand beach, the existence of any alleged future accretion, or the extent to which any member's property physically "contacts the water." [JA 207-25] Mr. Lindsey acknowledged that STBR's constitutional claims were the subject of separate litigation pending in the state circuit court. [JA 214] With respect to remedy, he made no claim for compensation, but sought to have the ECL removed in deference to his claimed riparian rights. [JA 214-15]

The ALJ's subsequent recommended order found the permit not to infringe the riparian rights of accretion, assuming the constitutionality of the statute. [PA 127] He further found no riparian right in Florida to contact the water, and noted that "riparian ownership only extends to the MHWL, and beachfront property usually is not in contact with the water." [PA 135 n.12] Alternatively, even if there were some infringement, the ALJ believed it not "unreasonable," thus obviating the need for evidence of upland interest in order for the project to move forward under the administrative rule. [PA 127] DEP adopted the Recommended Order in its entirety and the project thereafter commenced.[46] [PA 88-100]

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http://www.waltonpa.com (last visited Sept. 25, 2009) (showing the Alford property was acquired in 2001; the Frost property in 1994; the Lindsey property in 2001; the Spence property in 2002, and the Styslinger property in 1994); [JA 261 (sheet 7 of 9) (linking parcels with property owners)].

[46] STBR sought to stay the project, but the district court of appeal denied its motion, noting: "appellants primarily rely upon constitutional issues which are not at issue in this (Continued ...)

C. STBR Raises an As-Applied Constitutional Claim on Appeal.

STBR appealed DEP's Final Order to the First District Court of Appeal. [PA 61] It ostensibly raised only the issue of whether the authorization of the project amounted to an "as applied" taking of riparian rights as a matter of Florida constitutional law (their facial constitutional challenge to the Act remained pending in circuit court). [PA 74] The First District reversed.[47] [PA 84] It held that DEP had effected a "taking" of the upland owners' constitutionally protected riparian rights to "receive accretions and relictions to the property, and ... [to] have the property's contact with the water remain intact." [PA 84-86] It remanded the case, directing that there be satisfactory evidence of sufficient upland interest pursuant to agency rule. [PA 86 (referring to Fla. Admin. Code r. 18-21.004(3)(b))] The court denied motions for rehearing and rehearing en banc, but

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administrative appeal but are being litigated in the circuit court." [JA 262, 274] The project then began in January 2006 and, after being halted in May 2006 for six months due to issues with turtles [JA 278], the Walton County and Destin portions were completed on January 19 and June 24, 2007, respectively.

[47] The court incorrectly stated that the parties had agreed that "this project will cause the high water mark to move seaward and ordinarily this would result in the upland landowners gaining property by accretion." [PA 84] DEP's motion for rehearing, which sought to correct the Court's belief that "accretion" would occur (versus avulsive beach restoration seaward of the ECL) was denied. [PA 60]

certified a question of great public importance to the Florida Supreme Court, which granted review. [PA 2 (stating the original certified question)]

D. The Florida Supreme Court Upholds the Act's Facial Constitutionality.

The Florida Supreme Court, which heard oral argument on April 19, 2007, issued its decision on September 28, 2008. In an opinion by Justice Kenneth Bell, joined by four other justices, the Court limited its review to the question of whether the Act facially deprived upland owners of littoral rights without just compensation. [PA 3] The Court emphasized that its decision was "strictly limited to the context of restoring critically eroded beaches" under the Act [PA 4] and noted "a relative paucity" of prior opinions addressing the relationship between the state and upland owners regarding beaches. [PA 13, 25-26 (noting specifically that "Florida's common law has never fully addressed how public-sponsored beach restoration affects the interests of the public and the interests of upland owners")]

The Court thoroughly analyzed the state's common law and the Act's provisions, first noting the historic state sovereignty (back to English common law and colonial days) with respect to lands below the MHWL, which allow for public navigation, commerce, fishing, bathing, and other easements allowed by law in the waters. [PA 13-14] Florida law has recognized private upland owners to hold simultaneous bathing, fishing, and navigation rights in common with the public, but also to hold "several special or exclusive

common law littoral rights: (1) the right to have access to the water, (2) the right to reasonably use the water, (3) the right to accretion and reliction, and (4) the right to the unobstructed view of the water." [PA 17 (citing, *e.g.*, *Sand Key*, 512 So. 2d at 936)] The Court's review of its precedents showed consistent protection of the littoral rights of access, use, and view over the water, but lesser protection of upland interests in the context of state-filled sovereign submerged lands appurtenant to uplands. [PA 18 (citing, *e.g.*, *Duval Eng'g & Contracting*, 77 So. 2d at 434 (holding that upland owners had no right to compensation for the state's filling of riparian lands for bridge construction where there was only a slight impairment of littoral rights and little disturbance to water access, use, or view)]

The Court's opinion identified two substantial deficiencies in STBR's loss of accretion claim. First, this case involved no present existing accreted property:

> The littoral right to accretion and reliction is distinct from the rights to access, use, and view ... [because it involves] contingent, future interest[s] that only become[] a possessory interest if and when land is added to the upland by accretion or reliction.

[PA 20 (citing *Brickell v. Trammell*, 82 So. 221, 227 (Fla. 1919) ("[Littoral] rights ... give no title to the land under navigable waters except such as may be lawfully acquired by accretion, reliction and other

similar rights")] Second, the Court found claims to future accretion to be irrelevant in the beach restoration context. [PA 34, 40] This case, for example, involves no gradual, imperceptible changes that added to the property of STBR's members. [PA 23-24, 29-33] The Court noted that Florida's courts have not required the state to forfeit property or compensate upland owners for littoral rights claims where sand is deposited through avulsive circumstances. [PA 30-31 citing, *e.g.*, *Bryant*, 238 So. 2d at 837-38] In this way, the Court found the Act to codify relevant common law principles:

> [T]he Act authorizes actions to reclaim public beaches that are also authorized under the common law after an avulsive event. Furthermore, *the littoral right to accretion is not implicated by the Act because the reasons underlying this common law rule are not present in this context.*

[PA 40 (emphasis added)] The Court also concluded that no common law riparian right of "contact with the water" exists independent of the right of access. [PA 35-38] It found STBR's argument under Florida law was based on a single line in a single sentence in the *Sand Key* case, noting that the Court has "never addressed whether littoral rights are unconstitutionally taken based solely upon the loss of an upland owner's direct contact with the water." [PA 36] It observed that any right of contact in coastal areas is an inherently flawed notion, since the "foreshore technically separates upland property from

the water's edge at various times during the nineteen-year period" underlying the MHWL. [PA 37] The Court noted that the Act expressly preserved access rights to upland owners of littoral property and prevented the state from allowing structures to be erected seaward of the ECL that might tend to interfere with the rights of upland owners. *Id.* On this basis, the Court concluded that the law did not infringe the littoral right of "direct access" and fully preserved common law littoral rights of access, use, and view over the water. [PA 38, 40]

Given that riparian rights (including the rights of use, view, and access) remained intact, the Florida Supreme Court found that the state could lawfully restore critically eroded beaches under the Act to protect uplands and the beaches from future damage and erosion. [PA 40] It reemphasized its decision was "strictly limited to the context of restoring critically eroded beaches under the [Act]." *Id.* Its opinion did not reference the federal Constitution or any decisions construing the federal Takings Clause, but instead cited this Court's precedents that recognize littoral rights issues to be matters of state law. [PA 18 n.9]

In dissent, Justices Charles Wells and Fred Lewis separately objected to the Court's addressing a facial versus an as-applied claim, and believed that compensation must be paid in order to apply the Act. [PA 41, 57-58] Justice Lewis contended that the legal essence of littoral land "is contact with the water," and that the oceanfront property at issue was transformed into "something far less" that would require "full compensation." [PA 44-58] Though

finding the Act deficient as applied,[48] both Justices believed it could be constitutionally applied in other circumstances. [PA 41, 58] The Court denied rehearing. [PA 136] STBR sought review in this Court on a federal "judicial takings" theory, which was granted.

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[48] In contrast, the majority stated that "it is possible that STBR is without standing to raise this as-applied issue since its resolution might depend upon the assessment of particular facts and defenses inuring to each parcel and each individual owner." [PA 33 (citing *Fla. Home Builders Ass'n v. Dep't of Labor & Employment Sec.*, 412 So. 2d 351, 353 (Fla. 1982) (delineating the test for associational standing); *Palm Point Prop. Owners' Ass'n v. Pisarski*, 626 So. 2d 195 (Fla. 1993) (holding that a homeowners association lacks associational standing to enforce restrictive covenants applicable to its members' properties)]

SUMMARY OF THE ARGUMENT

This case addresses Florida's long-standing program for restoring and protecting its critically eroded beaches, the Beach and Shore Preservation Act ("Act"), which was first enacted over four decades ago. The Act authorizes the restoration of beaches that have become so critically eroded that they pose a substantial risk to public safety, private and public structures, upland property, and essential infrastructure such as roadways. Over the years, about 198 miles of Florida's 825 miles of beaches have been restored under the Act, providing enormous protection and benefits to the public as well as to thousands of beachfront property owners. None of these property owners have claimed entitlement to money or title to the state-owned portions of restored beaches – until now.

Petitioner (STBR), on behalf of its six members, claims that owners of littoral property along a beach restoration project have (a) vested rights to direct, continuous contact of their properties with the water's edge, and (b) vested rights to potential future accretions along the critically eroded beach. In its decision below, Florida's Supreme Court upheld the facial constitutionality of the Act, finding that the two littoral rights claimed are not recognized under state law or implicated by the Act. The court explicitly found no precedent on the former point, concluding that direct contact with the water's edge is ancillary to the common law right of access to the water, which is fully preserved under the Act. Moreover, it found that none of the common law justifications for

accretion were implicated by the Act, particularly given that upland owners along a beach restoration project bear no risk of erosion and loss or repair of property, a risk the government now bears.

STBR cites no relevant precedent, let alone a 100 year history of clearly-established state law, to support its claim to these two asserted rights. In contrast, the decision below is wholly supportable and provides no basis for a federal "judicial takings" claim under any formulation of the proposed doctrine. Because this case presents no basis for exploring the contours of a potential "judicial takings" theory, the Florida Supreme Court's decision should be affirmed.

On petition for review, STBR raises a claim that the Act itself, by establishing an erosion control line (ECL) and purportedly taking "all" littoral rights, has physically appropriated its members' property. The lower courts did not pass upon this federal claim for which jurisdiction is lacking. On the merits, this claim fails because the ECL was set at the existing legal boundary of littoral properties, which retain their littoral status and rights. STBR also abandoned its challenge to the setting of the ECL below. Under these circumstances, the Act's provisions cannot be said to violate STBR's members' rights.

Finally, STBR has raised for the first time a procedural due process claim, asserting that the Act provides insufficient notice and process. This claim was not asserted below, is without merit, and should be disregarded.

ARGUMENT

I. The Florida Supreme Court's Decision Is Not A "Judicial Taking."

The crux of STBR's judicial takings theory is its claim that the Florida Supreme Court's decision is a "sudden, dramatic change in state law, unpredictable in terms of relevant precedents,"[49] an odd spin on a case of first impression involving a forty year-old statute under which 198 miles of Florida's beaches have been restored. STBR has inaccurately stated the law of Florida and embellished the facts, making it sound as if private uplands have been transformed into state-owned beaches upon which all manner of activities by the public are allowed, resulting in the wholesale taking of littoral rights in their entirety from owners of beachfront property. A fair reading of the decision and applicable state laws paints a picture far different from what STBR has represented to this Court.

As the next sections explain, a judicial takings doctrine, if such a theory is even viable, has no possible application to the decision below under STBR's proposed standard or any other.[50] The

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[49] [Pet. Br. 17 (adopting two-part test from Justice Stewart's concurrence in *Hughes v. State of Wash.*, 389 U.S. 290 (1967))]

[50] State respondents support the position that the doctrine either should not exist (*see* Amicus Br., State of California), or should set a very high bar that is exceptionally deferential to preserve room for state appellate courts to render their decisions. *See* discussion *infra* p. 58.

decision is a carefully and narrowly written one, addressing novel and previously unaddressed issues of state law. The Florida Supreme Court has wrought no change in Florida law whatsoever. Its decision merely validates an established statutory framework by use of reasoning and analysis that is fully supportable. Given the unexceptional nature of the court's decision, and the exceptional nature of the state legislature's preservation, protection, and expansion of littoral rights, this case is an especially unsuitable vehicle for consideration of a judicial takings claim.

A. Rather Than Changing Florida's Common Law in a "Dramatic and Unexpected" or "Unpredictable" Way, the Decision to Uphold the Act is Consistent with Established Common Law Principles.

STBR makes two claims, both based on the notion that the decision below upended 100 years of well-established precedent in Florida law related to riparian/littoral rights. The first is that the decision below "ignored 100 years of Florida law" establishing a protectable property right in littoral property maintaining direct physical contact with the water. The second is that the decision below changed a purported "vested right to future accretions" into a "contingent future interest." [Pet. Br. 16] As the next two sections explain, and as the Florida Supreme Court held, the last century of Florida jurisprudence on riparian and littoral rights provides no support for STBR's unfounded assertions.

1. No independent Florida common law right exists to "contact with the water," which is an ancillary or subsidiary attribute to the recognized right of access to the water.

STBR's claim – that 100 years of Florida law grants owners of littoral property a protectable right to have their property continuously touch or have physical contact with the tidally-influenced water – is meritless for a number of reasons.

First, as the Florida Supreme Court thoroughly explained in its decision, actual physical contact is ancillary or subsidiary to the littoral right of access. [PA 35-38] The court focused on the single reference in *Sand Key* that purportedly created a right to contact, and weighed that language against its body of precedents, concluding that "under Florida common law, there is no independent right of contact with the water." [PA 36] Indeed, STBR's own claim has morphed in this litigation from a water "access" claim in its original petition [JA 60], to now an independent claim to contact the water or MHWL.

The Court found no precedent supporting the proposition that actual contact with the water is a vested property right held by littoral or riparian owners under state law. The Florida precedents make *access* to the water a protectable littoral right, but none have held that actual physical contact is an independent protectable interest. Thus, the court

noted that "[w]e have never addressed whether littoral rights are unconstitutionally taken based solely upon the loss of an upland owner's direct contact with the water." [PA 36]

Given that Florida law protects the right of access to the water, the Court reasonably concluded that the alleged right of contact is an ancillary or subsidiary attribute, noting that access is the "sole justification" for this attribute. [PA 37] As to access, the Court concluded that the Act fully preserves all existing access rights of littoral owners, including ingress and egress, as well as prohibiting structures on the beach seaward of the ECL. [PA 36 (citing Fla. Stat. § 161.201)] Under the Act, access to the water is preserved and nothing in the record below suggests that any owner of littoral property in the project area has had access diminished. Given that all existing littoral rights of access are preserved, the Court reasonably concluded that no facial constitutional violation existed. No sudden or dramatic change occurred, nor any unpredictable result.

Perhaps even more importantly, the Court explained both pragmatically and theoretically why a right of actual contact with the water does not exist. The reason is that although the legal boundary line is drawn at the MHWL (or ECL), water does not actually contact that boundary on a continual basis. The confluence of tidal flows and the legal definition of the boundary line results in no guarantee that the waters of the Gulf of Mexico will actually and continuously touch any littoral property along panhandle beaches. As the Court stated:

> [I]t is important to understand that ... *there is no littoral right to a seaward boundary at the water's edge in Florida.* Rather, as explained previously, the boundary between sovereignty lands and private uplands is the MHWL, which represents an average over a nineteen-year period. *Although the foreshore technically separates upland property from the water's edge at various times during the nineteen-year period, it has never been considered to infringe upon the upland owner's littoral right of access, which the ancillary right to contact is meant to preserve.* Admittedly, the renourished beach may be wider than the typical foreshore, but the ultimate result is the same. Direct access to the water is preserved under the Act. In other words, because the Act safeguards access to the water and because there is no right to maintain a constant boundary with the water's edge, the Act, on its face, does not unconstitutionally eliminate the ancillary right to contact.

[App. 37-38 (emphasis added)] This passage makes evident that constant contact with the water has never been protected because actual and continual contact does not, in fact, occur due to basic tidal principles and the application of the nineteen-year standard. At best, the tidal flow would result in water "touching" the upland intermittently, and not at all

for some extended periods. *See Borax Consol. v. City of Los Angeles*, 296 U.S. 10, 22-24 (1935) (discussing the effects of seasons and moon phases on ocean tides). Therefore, the Florida Supreme Court correctly answered the previously unaddressed question of whether the "right to contact" is a vested property right. Its decision is not sudden or dramatic, and is quite predictable given the Court's reasoning and harmonizing of past decisions, none of which addressed the topic, particularly in the context of the Act.

Notably, a lack of actual contact also arises where avulsion deposits sand seaward of the MHWL, creating a swath of dry land on state sovereignty property.[51] Under these circumstances, the pre-existing boundary between state and upland properties does not change. What does change is that tidal flows do not physically touch the private uplands; instead, they touch the newly created and wholly state-owned dry sand area. Again, no actual contact of tidal waters occurs with upland property, yet the character of the upland (so long as the water is easily accessed over the state-owned beach or shore) retains its littoral characteristics and rights, other than to future accretion.

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[51] *See, e.g., Bryant*, 238 So. 2d at 838; *Martin*, 112 So. at 287; *see also Sand Key*, 512 So. 2d at 940-41 (citing *Martin* and acknowledging that the state can uncover sovereign submerged land and would thereby divest an adjoining upland property of its accretion rights but not of its "waterfront characteristics").

STBR places substantial reliance on the *Sand Key* case, referring repeatedly to a single sentence in that decision, which states:

> Riparian and littoral property rights consist not only of the right to use the water shared by the public, but include the following vested rights: (1) *the right of access to the water, including the right to have the property's contact with the water remain intact;* (2) the right to use the water for navigational purposes; (3) the right to an unobstructed view of the water; and (4) the right to receive accretions and relictions to the property. *See Hughes v. Washington*, 389 U.S. 290, 88 S. Ct. 438, 19 L.Ed.2d 530 (1967); *County of St. Clair; Hayes; Brickell; Thiesen.*

512 So. 2d at 936 (emphasis added). This sentence is one of many in *Sand Key* that merely summarize, in an abbreviated way, the general nature of riparian and littoral rights in Florida.

This language – abbreviated dicta from a single opinion appearing nowhere else in Florida law – cannot be reviewed in a vacuum without examining its context and other Florida precedents. The statement in *Sand Key* was dicta because the only issue presented was, as the opinion reflects, a very narrow one: whether the state could claim title to land accumulated on waterfront property when the accumulation occurred slowly and imperceptibly, and

was caused in part by public improvements located one-half mile from the owner's property, and not constructed for that property's benefit. *Id.* at 935.

The accretion at issue in *Sand Key*, which by definition was gradual and imperceptible (versus the transformational beach restoration at issue here), occurred over a ten year period following the publicly-funded construction of the nearby jetty. The state claimed title to the accretions, *id.* at 935, and the trial court agreed, but the appellate courts both disagreed, finding that the gradual and imperceptible accumulation of accreted lands from mixed natural and artificial causes belonged to the upland owners.

Thus, the issue presented had nothing to do with contact with the water; instead, the narrow issue was the right to receive *existing* accreted property along the waterfront. Simply stated, *Sand Key* did not address the legal status of either future rights of accretion or a claimed right or attribute of direct contact with the water itself.

Given the narrow issue and holding in *Sand Key*, the Court's single statement, in background discussion, about the concept of "contact with the water" neither carries the weight that STBR attributes to it, nor compels this Court's or the Florida Supreme Court's recognition of it as an independent right. It is a most slender reed upon which to claim a well-established principle of Florida law with a purported 100-year history; indeed, its history is

limited to this lone passing reference of dicta in *Sand Key*. Furthermore, the five decisions[52] cited in *Sand Key* do not mention or establish a vested riparian right to continual direct contact with the water.

Notably, the phrase "right to have the property's contact with the water remain intact" is easily understood, in context, as shorthand for the right of a littoral owner to maintain his property's vital waterfront characteristics via access. *See Sand Key*, 512 So. 2d at 940-41 (acknowledging that under *Martin*, 112 So. 274, the sovereign could uncover land and effectively divest contact with the water, but *not* a property's "waterfront characteristics"). Interpreting "contact" more generally to refer to a property's waterfront character,[53] which the caselaw supports,[54]

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[52] *See Hughes*, 389 U.S. at 293 (loss of accreted land "would leave riparian owners continually in danger of losing the *access* to water" (emphasis added)); *County of St. Clair* v. *Lovingston*, 90 U.S. 46 (1874) (recognizing upland owner's right to existing accretion/alluvion); *Hayes* v. *Bowman*, 91 So. 2d 795, 799 (Fla. 1957) (describing common-law riparian rights of "an unobstructed view, ingress and egress over the foreshore from and to the water"); *Thiesen* v. *Gulf, Fla. & Ala. Ry. Co.*, 78 So. 491, 507 (Fla. 1917) (describing the "right of access to property over the waters, the unobstructed view of the bay, and the enjoyment of the privileges of the waters incident to ownership of the bordering land."); *Brickell*, 82 So. at 227 (describing common law riparian "right of access from the water to the riparian land and such other rights as are allowed by law.").

[53] "Contact" has various meanings including "touching" as well as "immediate proximity or association," which supports the notion that "contact" is shorthand for the upland property actually abutting state sovereignty lands thereby providing direct beach (Continued ...)

makes far more sense than STBR's legally insupportable and unrealistic claim of a right to actual continual direct contact with the water itself.[55]

Notably, STBR muddles the "right of contact" issue further by claiming that "100 years of Florida law requires a property to contact the MHWL to *possess* littoral rights." [Pet. Br. 16 (emphasis added)]

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access. *See* Dictionary.com, http://dictionary.reference.com/browse/contact (last visited Sept. 25, 2009).

[54] *See, e.g., White v. Hughes*, 190 So. 446, 448 (Fla. 1939) ("riparian or littoral rights are those allowed by law in the use of the waters and of the beach or shore between high and low water mark. Such uses include *access to the water from the abutting property over the beach or shore*, and, in common with the public, the rights of bathing, fishing, and navigation in the waters subject to appropriate valid governmental regulations." (emphasis added) (citation omitted)).

[55] STBR relies on *Belvedere Development Corporation v. Department of Transportation*, 476 So. 2d 649 (Fla. 1985), which is easily distinguishable on its facts and legal issues from the instant case. First, *Belvedere* involved an actual physical taking of uplands property. Second, it involved the severance of *all* riparian rights with *no access easement* to exercise them (versus the *preservation of littoral rights* under a critical state beach preservation program). Third, *Belvedere* amounted to a ploy to avoid paying the true value for physically taking the uplands of a riparian property by separating its riparian rights from such property. Importantly, the court in *Belvedere* stated that "*we will not hold that riparian rights are never severable from the riparian lands*. However, we must conclude that the act of condemning petitioners' lands without compensating them for their riparian property rights *under these facts* was an unconstitutional taking." *Id.* at 652 (emphasis added). The emphasized language was prescient; here, none of the facts or policy issues in *Belvedere* is at issue.

STBR has it backwards. No one but STBR questions that littoral rights continue to attach to the beachfront property of its members. Their properties fully retain their littoral status, as the Florida Supreme Court discussed and confirmed. What STBR ignores is that all littoral property in Florida is subject to having *no* contact with the water due to the tidal foreshore and to avulsion seaward of the MHWL. As the Florida Supreme Court explained, coastal properties continue to retain their littoral character under Florida's common law even where the state's submerged lands become dry lands through avulsion or the addition of protective sands. [PA 29-38]

In passing, STBR demeans the Florida Supreme Court's discussion of Florida's public trust doctrine [PA 13-16], claiming it is pre-textual because article 10, section 11 of the state constitution creates no specific duty to protect beaches and shorelines. [Pet. Br. 31-32] STBR fails to explain, however, why the state's management of its most valued natural resources under the doctrine would not include beach and shore management activities "for the benefit of the people." [PA 16 (citations omitted)][56] Indeed, it is a century-old principle that the State's obligation is to do so, as the court below and the caselaw explain.[57]

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[56] *See generally White*, 190 So. at 448-49 (noting "no custom more universal, more natural or more ancient, on the sea-coasts, ... than that of bathing in the salt waters of the ocean and the enjoyment of the wholesome recreation incident thereto.").

[57] [PA 13-16]; *see also, e.g., State v. Gerbing*, 47 So. 353, 356 (Fla. 1908) (noting that the state has the right to control sovereignty lands "for the benefit of the people of the state, as such right is as (Continued ...)

Likewise, STBR demeans the Florida Supreme Court's acknowledgement of the "policy of the state to conserve and protect its natural resources and scenic beauty" in article II, section 7(a) of the Florida Constitution. [Pet. Br. 32] Its hollow claim that beach restoration does not "protect [the state's] resources and natural beauty" is a non-sequitur.

In short, the Florida Supreme Court's decision caused no change in Florida law. As the Court demonstrated, no common law right exists in Florida for littoral property to have continual and direct physical contact with the water. The Act, which protects and supplements the well-established littoral right of access to the water, is facially constitutional as the Court concluded in a principled way.

2. Florida's common law creates a littoral right to existing accreted properties, but does not create an unyielding, vested right in potential and speculative future accretions, particularly where the common law basis for the accretion doctrine is absent.

STBR and its amici characterize the Florida Supreme Court's decision as judicially confiscating

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essential to the sovereignty, to the complete exercise of police powers, and to the welfare of the people of the new states as of the original states of the Union.").

accretion rights, repeatedly confusing the matter by making it sound as if *existing* accreted property is being taken. A right to existing accreted property is not at issue in this case; STBR's members have made no such claim and, indeed, no accreted property exists abutting the properties of those members of STBR who own littoral parcels.

The issue, as the Florida Supreme Court made abundantly clear [PA 20, 34], is the nature of a claim for *future* accretions *under the Act*. STBR ignores this distinction, relying heavily on *Sand Key*, which specifically involved parties claiming the right to existing, actual accreted property. *Sand Key* did not involve the right to potential *future* accretions, which has not previously been addressed by Florida's common law or accretion precedents. Tellingly, STBR can point to no Florida common law decision that clearly establishes a vested property right to future potential accretions; none exist.

Indeed, as the Florida Supreme Court held below, the nature of a claim to potential future accretion cannot be a vested property right due to its contingent and non-possessory nature. [PA 20] It is merely an expectation that if the common law basis for the accretion doctrine continues in force, and if actual accretion occurs and is proven, the upland owner is entitled to it. *See, e.g., United States ex rel. TVA v. Powelson*, 319 U.S. 266, 282 (1943) ("the

sovereign must pay only for what it takes, not for opportunities which the owner may lose").[58]

STBR claims that *State v. Florida National Properties, Inc.*, 338 So. 2d 13 (Fla. 1976), is "indistinguishable" from the instant case. [Pet. Br. 28] Yet the context and holding of that case are easily distinguishable. At issue was a statute that bears no resemblance to the Act. Unlike the Act, which sets the property boundary at the current MHWL, the statute in *Florida National* allowed the public/private boundary line along a lake to be set *retroactively to that existing as of the date of statehood* (March 3, 1845), rather than setting the boundary at the current high-water mark on a shoreline. *Id.* at 14. This divested owners of land that had accrued from accretions and reliction from the date of Florida's statehood in 1845 forward, constituting almost half of plaintiff's property. Unsurprisingly, the Court concluded that the retroactive line set by the statute was unconstitutional, and did not meet "present requirements of society." *Id.* at 19.

Here, in contrast, because the ECL is set at the current (i.e., existing pre-project) MHWL, no littoral owner loses any property. In addition, the statute in *Florida National* involved no beneficial governmental program, like the Act, which addressed a critical state

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[58] STBR's claimed loss of future accretion is highly speculative and akin to those for which no right exists. *See Coastal Petroleum v. Chiles*, 701 So. 2d 619, 625 n.2 (Fla. Dist. Ct. App. 1997) (rejecting a speculative claim to oil lease royalties).

problem; instead, it set property boundaries in isolation without any commensurate benefit to upland owners or any paramount public purpose for doing so. Finally, STBR has presented to this Court two quotations from *Florida National*, both erroneously represented as "holdings" of the Florida Supreme Court. [Pet. Br. 28, 29] Both were quotations from the trial court's order that the Court did not expressly affirm.

STBR also overlooks that the common law basis for the accretion doctrine is simply inapplicable under the Act, as the Florida Supreme Court explained. [PA 34, 40] The right of potential future accretions, of course, is not a "constitutional" property right as STBR and its amici incant. Riparian/littoral rights are not mentioned in the federal or constitutions.[59] They are established by state law[60] and are subject to modification.[61] Florida has never held that an upland owner must be compensated for a claimed loss of the speculative right to future accretions; instead, the

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[59] The only constitutional-based responsibilities at issue in this case are the state's with respect to public trust lands. *See* Fla. Const. art. X, § 11; [PA 16].

[60] *See Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law").

[61] *See, e.g., Port of Seattle v. Or. & W. R. Co.*, 255 U.S. 56, 64 (1921) (noting a state that wholly subordinated riparian interests and allowed development below the highwater mark that entirely separated upland owners from the water).

right is recognized only for deprivations of existing accreted property (as in *Sand Key*).

A review of the common law basis for the accretion doctrine demonstrates these points. The common law basis for assigning the accretion right to the upland owner is based substantially on the equitable notion that because the owner bears the risk of erosion and loss of lands, he should receive the benefit of any accreted lands. These principles of risk-bearing and the "significant historical foundation" of the accretion doctrine were discussed in *Sand Key*, quoting Blackstone:

> And as to lands gained from the sea, either by *alluvion*, by the washing up of sand and earth, so as in time to make *terra firma;* or by *dereliction*, as when the sea shrinks back below the usual watermark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining ... [T]hese owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible charge or loss.

512 So. 2d at 936-37 (citing 2 W. Blackstone, Commentaries 261-62). Indeed, this Court has recognized the risk/benefit basis for accreted lands, noting that the right to accretions is based on "the principle of natural justice, that he who sustains the burden of losses and of repairs, imposed by the contiguity of waters, ought to receive whatever

benefits they may bring by accretion[.]" *Banks v. Ogden*, 69 U.S. 57, 67 (1864).

Given the common law rationale for assigning accreted lands to upland owners, the Florida Supreme Court's reasoning logically follows: the Act relieves the upland owner of the erosion risk (which is shifted to the government) thereby removing the common law basis for the owner's equitable right to accretion. As Blackstone might put it, because upland owners are no longer "losers by the breaking in of the sea" the "possible gain" of accretion is no longer necessary as a "reciprocal consideration for such possible charge or loss." Because the accretion doctrine is not implicated under the Act, no deprivation of future accretion can occur.[62]

B. Even if the Florida Supreme Court's Decision Changed Florida's Common Law, It Did Not Violate the Federal Takings Clause.

Even if the Florida Supreme Court's decision could be characterized as a departure from its precedents, the decision results in no possible violation of the federal Takings Clause. *See PruneYard Shopping Center v. Robins*, 447 U.S. 74,

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[62] The Florida Supreme Court noted that the other three bases for the accretion doctrine (*de minimis non curat lex*; community interest in convenience of having accretion right assigned to upland owners; and the necessity of preserving the right of access to the water) also had no application under the Act. [PA 34-35]

82-83 (1980). A change in law alone, radical or otherwise, cannot amount to a judicial taking unless the challenged decision effects a recognized "taking" under federal law. Because the decision below neither caused nor results in a recognized "taking" of property under federal law, no need exists to determine the existence or contours of a judicial takings theory.

1. No ouster or physical appropriation under *Loretto* occurred.

First, the decision results in neither a physical taking of real property nor an ouster.[63] None of STBR's members has had any of their real property physically taken or appropriated under the decision. Upland owners continue to own all property landward of the preexisting boundary line (MHWL) in its entirety. Nothing has changed. All pre-project, dry sandy upland property remains in the hands of upland owners. The decision affects no per se or categorical taking of property as required for a facial taking under federal law.

STBR claims that a taking of all of its members' littoral rights has occurred by statutory replacement of "constitutional riparian rights" with statutory ones,

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[63] *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 (1982) (providing that a permanent physical installation involving "a direct physical attachment of plates, boxes, wires, bolts, and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall" effected an unconstitutional taking).

and that this amounts to a "physical taking." [Pet. Br. 54] This characterization is erroneous and nonsensical. It is erroneous because the members' riparian rights are not now – nor have they ever been – "constitutional riparian rights." Riparian rights are defined by principles of state property law, as embodied in statutes and common law.[64] Riparian rights have been explicitly preserved and supplemented under the Act, not displaced. It is nonsensical because the decision does not "oust" the upland owners from their property, either in fact, or by totally eliminating beneficial uses. Rather, the upland owners – both before and after the decision – retain possession and all beneficial uses of their existing property.

2. No per se taking under *Lucas*, or regulatory taking under *Penn Central*, occurred.

Second, nothing here has eliminated "all economically beneficial use" of the property or has any meaningful adverse economic effect on the property's value or use.[65] STBR has not, and indeed could not in

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[64] *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992) (acknowledging Court's "traditional resort to 'existing rules or understandings that stem from an independent source such as state law' to define the range of interests that qualify for protection as 'property' under the Fifth and Fourteenth Amendments").

[65] *Compare Lucas*, 505 U.S. at 1007 (Beachfront Management Act, whose effect was to bar erecting any permanent habitable structures rendering two residential lots "valueless", is (Continued ...)

good faith, contend that a deprivation of all economically viable use of its members' property has occurred; indeed, no meaningful deprivation could have occurred because the upland owners retain title to the same physical property with identical rights to use their properties and all waterfront characteristics intact as before the project.

STBR's claim that the project took property essentially by changing the private character of the beach to public is also wholly unsupported by the record. STBR's only witness, Mr. Lindsey, testified that the project might add 50 to 80 feet of dry sandy beach, but expressed no concern with prospective public use of the beach. [JA 223] Furthermore, he did not rebut testimony that the County had long maintained the beaches adjacent to STBR members' properties (since before 1990) as "high use areas." [JA 187, 190][66]

Indeed, the Florida Supreme Court's decision validating restoration projects, and the completed project here, both substantially and materially *benefit* upland owners. Upland properties were improved and

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compensable taking) *with Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 136 (1978) (historic landmark law "does not interfere in any way with the present uses of the Terminal.").

[66] Public beach access directly borders the property of one STBR member (Lindsey) and is very close to others. [JA 261 (sheet 7) (listing Spence, Alford, and Frost properties and 3 different Walton County TDC "beach access" areas within a 20-lot span)] The public regularly uses 55 beach and bay access points, 56 dune walkovers, and 350 trash receptacles permanently sited along the beaches. [JA 187-91, 193-94]

protected at no cost to their owners. Because the "whole purpose" of a beach restoration project "is to provide protection to the upland properties," it stands to reason that upland properties are substantially benefitted and their values enhanced rather than diminished in any meaningful way. [JA 76] In contrast, nothing in the record establishes a per se or categorical regulatory taking, nor can one plausibly exist where no diminution of use has occurred and the real property at issue has benefitted enormously from the restoration project.

***

Given Florida's jurisprudence regarding the two "rights" upon which STBR bases its argument, the Florida Supreme Court's decision can hardly qualify as a "judicial taking" within any plausible definition of the doctrine. The decision merely involved the facial constitutionality of a long-standing state statute on an issue of first impression under the Act. It established no judge-made law that departs from well-established precedents. In analyzing the Act, the Florida Supreme Court was deferential to and thorough in its analysis of Florida's common law. The court reviewed the state's law of littoral rights – with particular focus on accretion and access – and determined that the Act does not facially depart from its own precedents or constitutional norms. Because no change in Florida law occurred – let alone a sudden, dramatic or unpredictable change – no purported "judicial taking" exits under STBR's formulation of the doctrine.

Indeed, this case provides no basis for exploring a judicial takings theory generally. Federal courts should not involve themselves in and second-guess the evolution of state common law, which can vary widely from state to state. Federalism principles counsel that state appellate courts interpreting their state's laws under state constitutional law principles should not be subject to a federal takings claim, particularly on novel issues of state law in cases of first impression. A state supreme court's decision on a debatable matter involving its own common law is not the type of confiscatory use of governmental power the Takings Clause envisions.

State supreme courts are better positioned to know and apply their precedents, and should not be subject to potential Takings Clause litigation and liability absent a clear and incontestable showing that they have abused their judicial authority in such an egregious way that it can be fairly concluded that the decision is plainly a wholly unprincipled and pretextual departure from obvious and well-established legal principles; in addition it must show that it can be fairly concluded that a taking of property via a judicial ouster or physical appropriation was the intended result. The Florida Supreme Court's decision, which has none of these attributes, falls easily within the norms of adjudication and is thereby a poor vehicle for consideration of a judicial taking theory.

II. STBR's Federal Takings Claim Should Not Be Considered Or, Alternatively, Is Deficient.

In Section II of its brief, STBR raises a federal takings challenge, asserting that the Act itself confiscates physical property, leaves littoral owners "with no common law littoral rights at all," and transforms constitution-based rights into statutory rights. [Pet. Br. 52-54] This Court should not entertain a federal challenge that was not passed upon below. Neither lower appellate court addressed a federal takings claim, instead relying solely on Florida law. Under these circumstances, it cannot be said that a federal question is presented; jurisdiction is lacking. *See Adams v. Robertson*, 520 U.S. 83, 86-87 (1997).

Even if STBR's claim were addressed, its assertion that establishing an ECL is a physical taking is borne out by neither the language of the Act itself nor its application in this case. First, the ECL is set at the pre-project MHWL and thereby could not divest STBR's members of any of their physical property. Indeed, STBR dropped its challenge to the placement of the ECL.

Second, the Act explicitly preserves the ownership and waterfront characteristics of upland property consistent with the common law's protection of water access, use and view over the water to the

navigable channel. The claimed loss of *all* littoral rights is simply incorrect.[67]

Third, STBR can point to no provision of the federal or state constitutions for a "constitutional" right to actual contact with the water and a right to future accretion. Its characterization of these rights as "constitutional" rights is, again, incorrect.

Fourth, STBR claims the right to exclude the public from the newly-created state-owned sand buffer between the ECL and the "post-nourishment MHWL" – a right it claims was "once enjoyed" by its members. [Pet. Br. 54-55] The new sand buffer over state sovereignty lands, however, did not previously exist, making it unclear how STBR's member could have previously enjoyed such a right. Rather, what STBR's members are actually claiming is a right of *ownership* in the newly-created sand buffer between the ECL and the "post-nourishment MHWL" – a bold assertion given that the pre-project legal boundary of their property extended seaward only to the (uncontested) ECL and no further. Its view that it is legally entitled to what would amount to a substantial economic windfall (beyond what the Act already

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[67] Even if STBR's characterization of the claimed rights of water contact and future accretion were legitimate, these "rights" are non-compensable components in the far larger bundle of property rights that Florida law explicitly preserves to upland owners. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 327 (2002) (takings analysis "focuses ... on the nature and extent of the interference with rights in the parcel as a whole").

accords them) via the transfer of improved state-owned property to its side of the ledger at no cost find no support in law, logic, or equity.

Finally, takings analysis requires a tangible calculation of actual loss. But here, STBR established no baseline record of its members' property interests before the project sufficient to demonstrate the asserted value of lost contact with the water or future accretion.[68] [JA 207-25] With respect to remedy, Mr. Lindsey, on behalf of STBR and its members, made no claim for compensation, but only sought to have the ECL removed. [JA 214-15] For each of these reasons, STBR's claim in Section II must fail.

III. STBR's Procedural Due Process Claim Is Deficient And Was Not Raised Below.

Finally, STBR raises in this Court for the first time a claim that the Act allows the establishment of the ECL without sufficient procedural due process guarantees. [Pet. Br. 59] Its claim is substantively deficient, and must fail for the threshold reason that

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[68] Rather, as the Environmental Assessment ("E.A.") in this case reflects, the project area here would continue to erode without beach restoration due to anticipated recurrent storms. [*E.A., Walton County/Destin Beach Restoration Project 2003*, Admin. Hearing Jt. Ex. 1 at ¶¶ 2.1.1 ("The No Action alternative allows nature to take its course, i.e., storms will continue to erode the beach and further threaten upland development"); 4.3.2 ("Continued erosion of the beaches and shorelines along the study area threatens coastal habitat important to many species."); 4.9.1 ("The beaches would continue to erode and provide less width for recreation")]

it was not raised or decided below. With only "very rare" exceptions, this Court lacks jurisdiction and will not consider claims not addressed or passed upon below. *See Adams*, 520 U.S. at 86-87. No legitimate reason exists why this Court should take up a previously unasserted procedural due process claim that STBR failed to present to the Florida courts below. This point is particularly true given that STBR abandoned its challenges to the ECL and to the "critically eroded" character of the project area, thereby effectively waiving any claimed procedural deficiency under the Act. [JA 53]

Even on the merits, however, the procedures afforded by the Act are sufficient. The Act provides for notice, which STBR's members received [JA 90], and an opportunity for a public hearing related to the surveying and setting of an ECL prior to the Board's decision. Fla. Stat. § 161.161(4). If an owner seeks to challenge the Board's decision to adopt an ECL, it may do so in the recognized appropriate forum. The Act further protects property owners by restricting recordation of the ECL until review is complete, or the time for seeking review has passed. Fla. Stat. § 161.181. STBR's procedural due process claim is empty given the substantial process available to challenge an ECL, which STBR abandoned.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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SEPTEMBER 28, 2009

**COUNSEL OF RECORD*

APPENDIX

Chapter 70-276
Committee Substitute for House Bill No. 155

AN ACT relating to the establishment and implementation of publicly financed erosion control and beach restoration projects; declaring public policy; authorizing the Trustees of the Internal Improvement Trust Fund to establish in connection with a beach restoration program a surveyed "erosion control line" to serve as a boundary between State and privately owned lands; directing that such beach restoration programs be considered upon local application and requiring a determination of necessity by the State Department of Natural Resources and the Trustees of the Internal Improvement Trust Fund requiring the consent of certain riparian upland owners prior to establishment of the erosion control line; providing for objections by property owners affected; providing for judicial review of the decision of the Trustees of the Internal Improvement Trust Fund; providing for the recording of the survey depicting the erosion control line and the area of beach to be restored; establishing the rights of property owners in newly restored beaches; abrogating the common law effect of erosion and accretion to conform with the purpose of the act; preserving riparian rights; restricting construction on newly restored beaches; providing for abolishment of the erosion control line upon undue delay or failure in the construction or maintenance of the erosion control project; providing an effective date.

Whereas, beach erosion is a serious menace to the economy and general welfare of the people of this State; and

Whereas, preservation of our beaches is therefore a subject of great public interest and concern which requires appropriate action by the legislature to prevent further loss to one of our greatest natural resources; and

Whereas, title to the beaches and shores seaward of the mean high water line is vested in the State of Florida for the use and benefit of all its people; and

Whereas, title to the beaches and lands upland of the mean high water line is vested in the various public and private owners of record throughout the State of Florida; and

Whereas, proper nourishment and restoration of badly eroded beaches requires the financial support of both the State and Federal governments; and

Whereas, the necessary amounts of public funds cannot be authorized or expended to replenish eroded beaches unless the right of the public to the use and enjoyment of the restored beaches be preserved; and

Whereas, the proper claims and legitimate uses by both the State and private upland owners of lands created pursuant to a beach nourishment or restoration program can neither be determined nor exercised in the absence of a fixed and determinable property line between the two; and

Whereas, it is in the public interest that the legislature of the State of Florida make provision for publicly financed beach restoration programs and

establish and clarify the property rights of the State and private upland owners arising from or created by such restoration programs; Now, Therefore,

Be It Enacted by the Legislature of the State of Florida:

Section 1. Declaration of public policy.-Beach erosion being a serious menace to the economy and general welfare of the people of this State and having advanced to emergency proportions, it is hereby declared to be in the public interest that the Legislature of the State of Florida make provision for publicly financed beach nourishment and restoration programs and establish and clarify the property rights of the State and private upland owners arising from or created by such programs. The Legislature hereby declares that it is the public policy of the State of Florida and its intention by this act to cause to be fixed and determined, pursuant to beach restoration projects, the boundary line between sovereignty lands of the State bordering on the Atlantic Ocean, the Gulf of Mexico and the bays, lagoons and other tidal reaches thereof, and the upland properties adjacent thereto. It is further declared that there is no intention on the part of the State to extend its claims to lands not already held by it, nor to deprive any upland or submerged owner of the legitimate and constitutional use and enjoyment of his property. If a requested and authorized beach nourishment, replenishment or erosion control project cannot reasonably be accomplished without the taking of private property, then such taking shall be made by the requesting authority by eminent domain proceedings.

Section 2. As used in this act the following terms shall mean:

(1) Trustees-The Trustees of the Internal Improvement Trust Fund.

(2) Requesting authority-Any coastal county, municipality or beach erosion control district which requests a survey by the Trustees under the provisions of this act.

(3) Erosion control line-The line determined in accordance with the provisions of this act which represents the landward extent of the claims of the State in its capacity as sovereign title holder of the submerged bottoms and shores of the Atlantic Ocean, the Gulf of Mexico and the bays, lagoons and other tidal reaches thereof, on the date of the recording of the survey as authorized in Section 5 of this act.

Section 3. (a) Upon the request by written resolution of a requesting authority for a survey preliminary to the implementation of a beach nourishment or restoration program, the Trustees shall first require the State Department of Natural Resources to furnish a written recommendation approving or disapproving the requested project and if approval be recommended, to certify in writing that: (1) severe beach erosion has occurred in the area encompassed by the requested survey; and (2) the beach sought to be nourished or restored has been or will be destroyed in the immediate future unless a publicly financed program is undertaken. Upon receipt of the written recommendation and certification from the State Department of Natural Resources, the Trustees shall decide whether, in light of existing needs throughout the State, the project should be pursued. In determining the priority of

projects to be undertaken, the Trustees shall consider the relative need for protective measures, the availability of necessary equipment and the anticipated local and federal contribution and cooperation. If the Trustees determine that the requested project should be pursued, they shall forthwith conduct a survey of all or part of the shoreline within the jurisdiction of the requesting authority in order to establish the area of beach to be restored and locate an erosion control line; provided that no such line shall be fixed except in connection with an authorized beach nourishment, replenishment or erosion control project in which the requesting authority has secured the written consent of the owners of a majority of the lineal feet of contiguous riparian property which either abuts the requested erosion control line or would abut such line if established at the line of mean high water, for the establishment of such a line; provided further, that nothing herein shall be construed as preventing a requesting authority from participating in the funding of erosion control projects or surveys undertaken in accordance with the provisions of this act and in lieu of conducting a survey, the Trustees may accept and approve a survey as initiated, conducted and submitted by the requesting authority if said survey is made in conformity with the appropriate principles set forth in this act.

(b) Upon completion of the survey depicting the area of beach to be restored and the proposed location of the erosion control line, the Trustees shall give notice of the written resolution of the requesting authority, the survey, and the date on which the Trustees will hold a public hearing for the purpose of receiving evidence on the merits of the requested project and, if approval be granted, of locating and

establishing such requested erosion control line. Such notice shall be by publication in a newspaper of general circulation published in the county or counties in which the proposed beach restoration project shall be located not less than once a week for three (3) consecutive weeks and by mailing copies of such notice by certified or registered mail to each riparian owner of record of upland property, lying within 1,000 feet (radial distance) of the shoreline to be extended through construction of the proposed beach restoration project, as his name and address appear upon the latest tax assessment roll, in order that any persons who have an interest in the beach nourishment or restoration program or in the location of such requested erosion control line can be present at such hearing to submit their views concerning necessity for the program and the precise location of the requested erosion control line.

(c) In the public hearing described in Section 3 (b), the Trustees shall consider such evidence as may be offered by interested parties bearing on the necessity or propriety of the beach nourishment or restoration program or on the proposed location of the erosion control line. Prior to conclusion of the hearing, the Trustees shall approve or disapprove the beach nourishment or restoration project and, if approval be granted, shall establish the location of the erosion control line; provided that in locating said line, the Trustees shall be guided generally by the existing line of mean high water bearing in mind the requirements of proper engineering in the restoration project, the extent to which erosion or avulsion has occurred, and the need to protect existing ownership of as much upland as is reasonably possible. In the event riparian upland owners agree to furnish financial or other acceptable assistance in the beach restoration project,

the Trustees are authorized to locate the erosion control line a sufficient distance seaward of the existing line of mean high water in order to provide for an equitable distribution of the restored beach between the State and such existing upland owners.

Section 4. (a) Any person, natural or artificial, who is aggrieved by the decision of the Trustees in authorizing the beach nourishment or restoration program or in locating the erosion control line may within sixty (60) days from the day of the Trustees' decision have the decision reviewed by the appropriate Circuit Court by filing therewith a Petition for Issuance of a Writ of Certiorari, and it shall be the duty of the Trustees to cause to be prepared and certified, at the cost of the Appellant, a transcript of all proceedings including the evidence introduced at such hearing, and the Court shall hear and determine the cause on the record without indulging any presumption in favor of the decision of the Trustees. In the event the decision is not sustained, the Court shall tax the cost of preparing the transcript against the Trustees. The right of review herein authorized is not exclusive, and any person asserting any rights adversely affected may institute and process any proceeding authorized by law (including without limitation extraordinary remedies and writs) or in equity. However, any Appellant shall not be required to pay more than two hundred dollars for or toward a transcript that may be desired if an Appeal is taken as authorized in this Section.

(b) In the event a Court of competent jurisdiction determines that the proposed erosion control has been improperly located by the Trustees, the Trustees shall, within sixty (60) days from the

expiration of the judicial proceedings, including appellate proceedings if an appeal be taken, relocate the erosion control line in accordance with the opinion of the Court. If, as a result of the judicial proceedings authorized herein, the decision of the Trustees to authorize a beach nourishment or restoration program is determined to be invalid or said Trustees are otherwise prevented from implementing such program or said Trustees are required to relocate the erosion control line, the property owner or claimant shall be awarded reasonable attorney's fees and costs incurred in the suit.

Section 5. In the absence of an appeal within the time prescribed from the decision of the Trustees or if an appeal be timely taken, in the absence of a final decision of a Court of competent jurisdiction preventing the implementation of a beach nourishment or restoration program or invalidating, abolishing or otherwise preventing the establishment and recordation of the erosion control line as provided herein, the Trustees shall file in the public records of the county or counties in which the erosion control line lies, a copy of the Trustees' resolution approving the beach nourishment or restoration program and locating the erosion control line and shall also file and cause to be recorded in the book of plats of said county or counties a survey showing the area of beach to be restored and the location of the erosion control line.

Section 6. (a) Upon the filing of a copy of the Trustees' resolution and the recording of the survey showing the location of the erosion control line and the area of beach to be restored as provided in Section 5 hereof, title to all lands seaward of the erosion control line shall be deemed to be vested in the State

of Florida by right of its sovereignty and title to all lands landward of such line shall be vested in the riparian upland owners whose lands either abut the erosion control line or would have abutted the line if it had been located directly on the line of mean high water on the date the Trustees' survey was recorded.

(b) Once the erosion control line along any segment of the shoreline has been established in accordance with the provisions of this act, the common law shall no longer operate to increase or decrease the proportions of any upland property lying landward of such line either by accretion or erosion or by any other natural or artificial process, except as provided in Section 8 (b) and (c) of this act; provided, however, that the State shall not extend nor permit to be extended through artificial means that portion of the restored beach lying seaward of the erosion control line beyond the limits set forth in the survey recorded by the Trustees unless the State first obtains the written consent of all riparian upland owners whose view or access to the water's edge would be altered or impaired.

Section 7. Any upland owner or lessee who by operation of this act ceases to be a holder of title to the mean high water line shall, nonetheless, continue to be entitled to all common law riparian rights except as otherwise provided in Section 6 (b) hereof, including but not limited to rights of ingress, egress, view, boating, bathing and fishing. In addition the State shall not allow any structure to be erected upon lands created, either naturally or artificially, seaward of any erosion control line fixed in accordance with the provisions of this Section, except such structures required for the prevention of erosion. Neither shall such use be permitted by the State as may be

injurious to the person, business or property of the upland owner or lessee and the several municipalities, counties and special districts are also authorized and directed to enforce this provision through the exercise of their respective police powers.

Section 8. (a) If for any reason construction of the beach nourishment or restoration program authorized by the Trustees is not commenced within two (2) years from the date of the recording of the Trustees' survey as provided in Section 5 hereof, or in the event construction be commenced but halted for a period exceeding six (6) months from commencement, then upon receipt of a written petition signed by those owners or lessees of a majority of the lineal feet of riparian property which either abuts or would have abutted the erosion control line if the same had been located at the line of mean high water on the date the Trustees' survey was recorded, the Trustees shall forthwith cause to be cancelled and vacated of record the resolution authorizing the beach restoration program and the survey locating the erosion control line, and the erosion control line shall be null and void and of no further force or effect.

(b) If the State, county, municipality or erosion control district or other governmental agency charged with the responsibility of maintaining the restored beach fails to maintain the same and as a result thereof the shoreline gradually recedes to a point or points landward of the erosion control line as established herein, the provisions of Section 6 (b) shall cease to be operative as to the affected upland.

(c) In the event a substantial portion of the shoreline encompassed within the restored project

recedes landward of the erosion control line, the Trustees on their own initiative may direct or request, or upon receipt of a written petition signed by the owners or lessees of a majority of the lineal feet of riparian property lying within the restoration project shall direct or request the agency charged with the responsibility of maintaining the beach to restore the same to the extent provided for in the Trustees' recorded survey. If the beach is not restored as directed or requested by the Trustees within a period of one year from the date of the directive or request, the Trustees shall forthwith cause to be cancelled and vacated of record the resolution authorizing the beach restoration program and the survey locating the erosion control line, and the erosion control line shall be null and void and of no further force or effect.

Section 9. This act shall take effect October 1, 1970.

Became a law without the Governor's approval.

Filed in Office Secretary of State July 2, 1970.

REPLY BRIEF

144

(30)

No. 08-1151

Supreme Court, U.S.
FILED
OCT 27 2009
OFFICE OF THE CLERK

In The Supreme Court of the United States

STOP THE BEACH RENOURISHMENT, INC.,

Petitioner,

v.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND, WALTON COUNTY, and CITY OF DESTIN,

Respondents.

On Writ of Certiorari to the Florida Supreme Court

REPLY BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

The Florida Supreme Court invoked "nonexistent rules of state substantive law" to reverse 100 years of uniform holdings that littoral rights are constitutionally protected. In doing so, did the Florida Court's decision cause a "judicial taking" proscribed by the Fifth and Fourteenth Amendments to the U.S. Constitution?

Is the Florida Supreme Court's approval of a scheme that eliminates constitutional littoral rights and replaces them with statutory rights a violation of the Due Process and Takings Clauses of the Fifth and Fourteenth Amendment to the U.S. Constitution?

Is the Florida Supreme Court's approval of a scheme that allows an executive agency to unilaterally modify a private landowner's property boundary without notice or a judicial hearing or the payment of just compensation a violation of the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution?

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INTRODUCTION

"The only dependable foundation of personal liberty is the personal economic security of private property."[1]

This Court has recognized that states have authority to define "property" for purposes of the Fifth and Fourteenth Amendments. *See Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) (the Constitution does not create property interests; instead they derive from an "independent source such as state law rules or understandings"). The Florida Supreme Court abused this authority by depriving littoral owners of what, for 100 years, has been their "property" by suddenly declaring that the "property" never existed under state law. The central question in this case is what federal constitutional remedy applies in such circumstances.

Respondents Walton County and City of Destin (collectively "County") and Florida Department of Environmental Protection and the Board of Trustees of the Internal Improvement Trust Fund (collectively "DEP") now assert that the Florida Supreme Court effected no changes to Florida property law,[2] despite previously admitting that changes in Florida property law had occurred.[3]

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[1] Walter Lippmann, *The Method of Freedom* 101 (1934).

[2] *See* County Brief, pt. III; DEP Brief, pt. I.A.2.

[3] Answer Brief of Appellee Florida Department of Environmental Protection at pt. III, *Save Our Beaches, Inc. v. Dep't of Envtl. Protection*, 31 Fla. L. Weekly D1173 (July 7, 2006) (No. 1D05-4086); Petitioners/Appellants' Initial

The Answer Briefs misstate the facts, obfuscate the issues, focus on the irrelevant alleged "public good" done by the Beach and Shore Preservation Act, Chapter 161 of the Florida Statutes (2003) (hereinafter "Act"),[4] and create after-the-fact justifications for the Florida Supreme Court's actions.[5] Respondents also claim waiver when Respondents themselves have waived any claim of procedural irregularities under this Court's Rule 15.2.

This Reply Brief exposes the flaws in Respondents' arguments in turn; however, Petitioner ("STBR"), initially pauses to correct two misrepresentations that permeate the Answer Briefs.

Brief on the Merits at 13-14, *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So.2d 1102 (Fla. 2008) (No. SC06-1447) [hereinafter *County FSC Brief*]. DEP's current "no change in Florida law" position directly contradicts its finding in its Final Order:

> Whether or not correct under the common law, it is certainly the case under [the Act] that the right to future accretion and the right of riparian land to touch the water have both been statutorily eliminated by [the Act] . . . .
>
> It is the establishment of the ECL and the [Act] . . . which might arguably be asserted as infringing on the common law rights of riparian owners.

Pet. App. 93-94.

[4] The original petition challenged the 2003 version of the Act; thus, all citations will be to the 2003 version.

[5] Respondents essentially ignore the merits of Questions II and III for which certiorari was granted; presumably because their positions are indefensible.

First, Respondents claim that STBR's motives are to gain private ownership of the state-created "new beach" for free. *See* County Brief 1-2, 17, 18, 37; DEP Brief p. 60-61. STBR has consistently opposed the project. STBR filed two motions to stay the permit's effectiveness and halt construction of the project until resolution of the appeal.[6]

Respondents proceeded with the project – even trespassing on private property – despite the appeal of the permit. It is now disingenuous for Respondents to imply that STBR relented during project construction to suddenly claim ownership of the new beach.

Perhaps Respondents intend to camouflage their own land grab. STBR's members never needed, or requested additional sand, as they owned littoral property on an accreting beach.[7] STBR members seek only what their deeds say they own, nothing more and nothing less. Barring return of their property rights, they have alternatively sought compensation.

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[6] *See* Petition to Stay Agency Action, *Save Our Beaches, Inc. v. Dep't of Envtl. Protection*, DEP No. 04-1370 (July 27, 2005); Response in Opposition to Petitioners' Motions for Stay of Mandate, *Save Our Beaches, Inc. v. Dep't of Envtl. Protection*, 31 Fla. L. Weekly D1173 (July 7, 2006) (No. 1D05-4086); Appellants' Motion for Stay, *Save Our Beaches, Inc. v. Dep't of Envtl. Protection*, 31 Fla. L. Weekly D1173 (July 7, 2006) (No. 1D05-4086).

[7] App. 252, 261. Respondents' claim that the beach is "eroded" ignores the only record evidence showing that any loss of beach sand resulted from hurricanes, which cause avulsion, not erosion.

Second, the suggestion that this Court should dismiss the writ of certiorari because STBR's members have not sought compensation from the state courts is inaccurate. *See* U.S. Amicus Brief p. 19-22. STBR's answer briefs asked the Florida courts for compensation by concluding: "the complete elimination of riparian rights is a physical taking that must be compensated." *See* Respondent's Amended Answer Brief at 50, *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So.2d 1102 (Fla. 2008) (No. SC06-1449), and at 37 in Case No. SC06-1447.

Respondents also suggest that STBR must file a lawsuit in a Florida circuit court seeking compensation for property rights that the Florida Supreme Court decided no longer exist. Such an exercise would not only be futile but absurd.

ARGUMENT

"The preservation of the rights of private property was the very keystone of the arch upon which all civilized governments rest."[8]

I. Respondents' Taking of Littoral Rights Is A Physical Taking.

A. Littoral rights are valuable.

Respondents demean the significance and value of littoral rights and oceanfront property. In Florida, it is a "general rule that waterfront property

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[8] Joseph H. Choate *in* Laurence J. Peter, *Peter's Quotations* 411 (2003).

is valued at a premium." *Peebles v. Canal Auth.*, 254 So.2d 232, 233 (Fla. 1st DCA 1971). Many courts have recognized this premium. *Thiesen v. Gulf, Fla. & Ala. Ry. Co.*, 78 So. 491, 507 (Fla. 1917) ("The fronting of a lot upon a navigable stream or bay often constitutes its chief value and desirability"; further, "riparian rights incident to the ownership of the land were the principal, if not sole, inducement leading to its purchase . . . ."); *Pilafian v. Cherry*, 355 So.2d 847, 849 (Fla. 3d DCA 1978) (recognizing property not extending to navigable water would greatly diminish the value of the property), *rev. denied*, 361 So.2d 834 (Fla. 1978).

This Court has also recognized that a property's most valuable aspect is its fronting the water. *Hughes v. Washington*, 389 U.S. 290, 293 (1967) (concurring) (recognizing access to water is often the most valuable feature of riparian property); *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 329 (1973) (recognizing riparian character of the land is a valuable feature), *overruled on other grounds*, *Or. ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977); *Potomac Steam-Boat Co. v. Upper Potomac Steam-Boat Co.*, 109 U.S. 672, 699 (1884) (recognizing present and historic value of riparian rights); *Yates v. Milwaukee*, 77 U.S. 497, 504 (1870) ("This riparian right is property, and is valuable.").

B. Severing upland property from the MIIWL is a physical taking.

Respondents argue that no physical taking has occurred because STBR's members still own every square inch of land they previously owned.

The opinion below has, however, transformed the essential character of every single one of those square inches. What was once oceanfront property is no longer. When DEP recorded the ECL, it robbed the property of its oceanfront character and transformed it into significantly less desirable and less valuable ocean-view property. The subsequent creation of a strip of dry land seaward of the ECL physically took the littoral character of STBR's members' property. The filing of the ECL survey in the official records changing the legal descriptions in STBR's members' deeds confirms this transformation.

The State now possesses the littoral property rights that STBR's members once owned. Such a taking is a physical taking. *See Lee County v. Kiesel*, 705 So.2d 1013 (Fla. 2d DCA 1998) (compensation required for physical taking of riparian owner's right of view when a bridge was built entirely on state property and not a square inch of property was taken from the riparian owner).

The Florida Supreme Court has repeatedly rejected attempts to sever littoral rights from littoral property without paying compensation. In *Worth v. City of West Palm Beach*, the court held:

> It appears to us that the chancellor did not take into consideration the damage suffered by the complainant in the court below in his property or privilege of riparian rights by reason of the city appropriating this strip of land for street purposes. Certainly those rights

> were damaged to a great extent by . . . [creation of a road] . . . between the remainder of the property and the . . . line where riparian rights begin, and **it may be said that the privacy of the riparian rights was totally destroyed by the construction . . . of the public street.** The record shows that the remainder of the property, exclusive of riparian rights, **was divested of a considerable part of its value by reason of the construction . . . of a public street which cut off the property from the water front.**

132 So. 689, 689-90 (Fla. 1931) (emphasis added).[9]

The court found the riparian rights "totally destroyed" when the government separated a riparian owner from the water. *Id.* There was no question whether a taking of riparian rights occurred. The only question was how much compensation was due.

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[9] *Accord Peebles*, 254 So.2d at 233-34 ("In the case sub judice, Smith's original appraisal was based upon an assumption of access across the property taken. Accepting the general rule that waterfront property is valued at a premium, it is incomprehensible to this Court how the removal of that assumption of access could result in the same appraisal of the appellants' remaining property. . . . **[I]t cannot be said that owning fee simple absolute title to the water's edge is the same as owning fee simple absolute title to a point 300 feet from the water's edge with intervening fee simple absolute title vested in another**." (emphasis added)).

The County ironically hypothesizes construction of a road below the mean high water line ("MHWL") completely on state land to argue that the law of eminent domain would regard the damages to the littoral owner (*i.e.*, separation from the MHWL) as "inconsequential," but cites no Florida law for this proposition. *See* County Brief p. 50-51. The *Worth* and *Peebles* cases cited above debunk this assertion. *See Lee County*, 705 So.2d 1013 (compensation required for a physical taking of riparian owner's right of view for bridge built completely on state property); *State Road Dep't v. Kendry*, 213 So.2d 23 (Fla. 4th DCA 1968), *rev. denied*, 222 So.2d 752 (Fla. 1969) (recognizing a cause of action to require eminent domain proceedings where state filled submerged lands below ordinary high water line ("OHWL") separating riparian upland from OHWL and appropriating riparian rights).

C. The record is more than adequate to find a physical taking.

Respondents suggest that the record is not adequate to determine whether a taking has occurred. All of Respondents' questions, however, relate to an inapplicable regulatory takings analysis.

There is no "regulation" applicable to STBR's members' properties and the State is not limiting any "use" of their properties. Rather, the Florida Supreme Court interpreted the Act to change the legal descriptions in STBR's members' deeds converting waterfront property to water-view. The State now holds what STBR members once held:

oceanfront property with all attendant littoral property rights.

The taking of property from A and giving it to B is a "physical" taking. In a physical taking, a Court does not look at the ad hoc factors claimed missing from the record by Respondents. Rather, the government "has a categorical duty to compensate the former owner," *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002), "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner . . . ." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982). The record is more than adequate to establish Respondents' physical taking.

II. Changing 100 Years of Property Law.

Respondents have now uniformly abandoned previous admissions that littoral property rights were taken (albeit, they argued, in a noncompensable regulatory manner) to defend the Florida Supreme Court's newfound "principled" reasoning. Surprisingly, no Respondent argued this "principled" reasoning below, but now all Respondents suddenly proclaim it is "fairly and substantially" based in existing state law. *See supra* note 3. The truth is even Respondents could not foresee or predict the Florida Supreme Court's sudden and dramatic change of 100 years of state property law.

Respondents assert that the "Florida Supreme Court has wrought no change in Florida law whatsoever." DEP Brief p.38, 48, & 57; County Brief

p. 32-37. For 100 years, the following principles of law have been repeatedly reaffirmed in Florida:

- Littoral rights are constitutionally protected property rights that cannot be taken without just compensation.[10]

- Littoral rights are common law property rights that attach only to properties contiguous to the MHWL.[11]

- Littoral rights include, *inter alia*, vested rights of exclusive access to the water, and to receive accretions.[12]

Since 1953, Florida law has recognized that littoral rights are inseparable from the littoral land.[13]

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[10] *Brickell v. Trammell*, 82 So. 221, 227 (Fla. 1919) (Riparian or littoral rights "are property rights that may be regulated by law, but may not be taken without just compensation and due process of law."); *accord Board of Trs. v. Sand Key Assoc., Ltd.* ("*Sand Key*"), 512 So.2d 934, 936 (Fla. 1987); *Belvedere Dev. Corp. v. Dep't of Transp.*, 476 So.2d 649, 651 (Fla. 1985); *Florida v. Fla. Nat'l Props., Inc.* ("*Florida National*"), 338 So.2d 13, 17 (Fla. 1976); *Thiesen*, 78 So. at 507; *Broward v. Mabry*, 50 So. 826, 830 (Fla. 1909). *See* Petitioner's Brief, p. 19-31, for elaboration of these cases.

[11] Fla. Stat. § 253.141; *Belvedere*, 476 So.2d at 651; *Miller v. Bay-to-Gulf, Inc.*, 193 So. 425, 427 (Fla. 1940); *Brickell*, 82 So. at 229-30; *Thiesen*, 78 So. at 500.

[12] *Sand Key*, 512 So.2d at 936; *Bd. of Trs. v. Medeira Beach Nominee, Inc.* ("*Medeira Beach*"), 272 So.2d 209, 214 (Fla. 2d DCA 1973); *Florida National*, 338 So.2d at 17.

[13] 1953 Laws of Florida ch. 28262 (littoral rights "are appurtenant to and are inseparable from the [littoral] land.") (codified at Fla. Stat. § 253.141); *accord Belvedere*,

These principles form the foundation of Florida property law with respect to littoral rights attaching to all 1,350 miles of littoral shoreline in the State of Florida and have for scores of years. This was undisputedly the law until the Florida Supreme Court issued its opinion below.

That opinion created a different set of legal principles. The traditional set of principles continues to apply to the 1,152 miles of Florida's unrestored coastline. The remainder of Florida's coastline, however, is now subject to a new and different set of legal principles regarding littoral rights (*i.e.*, common law littoral rights do not exist, only the Act's fewer, inferior, and revocable statutory rights).

The Florida Supreme Court and Respondents pretend that no principle of Florida law was changed by recasting the issue as one of "first impression." This ignores the reality that the Florida Supreme Court created "new law" to replace the 100 years of previously applicable law effecting a sudden and dramatic change in the law notwithstanding the court's nomenclature. This type of gamesmanship has been described as follows:

> the courts have indulged in the fiction that, when they re-interpret property law, they never deny anyone a property right. Rather, they simply "clarify" that, although some members of society may

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476 So.2d at 651 (expressly holding that riparian rights cannot be severed from riparian uplands absent an agreement with the riparian owner).

> have imagined that they had property rights, such rights in fact never existed.

David A. Dana & Thomas W. Merrill, *Property Takings* 230 (2002).

The Florida Supreme Court's intentional avoidance of 100 years of controlling law is so obvious that two dissenting justices sharply criticized the majority's legal manipulation. *See* Pet. App. 41-43. Justice Lewis, in his dissent, candidly exposed the majority's fiction:

> I cannot join the majority because of the manner in which it has "butchered" Florida law . . . [and] unnecessarily created dangerous precedent constructed upon a manipulation of the question actually certified. Additionally, I fear that the majority's construction of the . . . Act **is based upon infirm, tortured logic and a rescission from existing precedent under a hollow claim that existing law does not apply or is not relevant here.** Today, the majority has simply erased well-established Florida law without proper analysis . . . .

Pet. App. 41-42. (emphasis added). Respondents continue the fiction by unsuccessfully trying to distinguish two recent affirmations of Florida law while ignoring the numerous prior cases establishing the fundamental principles noted above.

A. The littoral right of access and the right to maintain contact with the MHWL have been taken.

Respondents continue to ignore the foundational condition precedent for the existence of all common law littoral rights: contact with the MHWL. If there is no contact with the MHWL, no common law littoral rights can exist at all.

Looking beyond Respondents' rhetoric, the issue is simple. The entire constitutionally protected littoral right of access (as well as the littoral rights to accretion and view) has been lost. Whether the littoral right of access includes an "independent" or "ancillary" right to maintain contact with the water is of no moment as the **ENTIRE** common law right of access that has existed for 100 years has been eliminated.

The substitution of an inferior and revocable statutory right of permission to cross state-owned property to reach the water – to which Respondents cling as a saving grace – is no replacement for a constitutionally protected common law littoral property right of exclusive access. *See Peebles,* 254 So.2d at 233 ("Privileges, such as a right of access to the [water], which are merely permissive and subject to revocation by the condemning party at any time cannot be availed of in the reduction of damages.").

Respondents' argument that the Act can destroy a right, but at the same time "preserve" it, is oxymoronic. Common law littoral rights exist only when a property touches the MHWL. Respondents do not explain how common law rights can still exist

or can legally be "preserved" (beyond stating the Act says so) when the connection with the MHWL has been severed by the ECL. The Florida Supreme Court has previously rejected this fictional logic.

In *Belvedere,* the Florida Department of Transportation ("DOT") condemned a parcel of riparian property from Belvedere and sought to "reserve" the riparian rights to Belvedere to avoid paying for the rights. *Belvedere,* 476 So.2d at 650. Belvedere alleged that DOT was taking only a portion of its lands and was required to take all of it or pay severance damages. *Id.* at 650.

The district court of appeal upheld the reservation but certified the question of severability of riparian rights to the Florida Supreme Court. *Belvedere Dev. Corp. v. Dep't of Transp.*, 413 So.2d 847, 851 (Fla. 4th DCA 1982), *overruled by*, 476 So.2d 649. Tellingly, the justice concurring specially in certification stated: "To speak of riparian or littoral rights unconnected with ownership of the shore is to speak a *non sequitur*. Hopefully, the Supreme Court will take jurisdiction and extinguish this rather ingenious but *hopelessly illogical hypothesis.*" *Belvedere*, 413 So.2d at 851 (emphasis added).

The Florida Supreme Court held that "riparian rights are appurtenant to and inseparable from the riparian land." *Belvedere*, 476 So.2d at 651. It invalidated the attempted reservation of riparian rights because the rights could not exist apart from the riparian upland and the attempted reservation "was an unconstitutional taking." *Id.* at 652.

Justice Lewis exposed the Florida Supreme Court's dismissive treatment of *Belvedere* as a fiction in his dissent:

> Notwithstanding its apparent inconvenience to the majority, Belvedere continues to stand for the principle of law that riparian or littoral rights are generally inseparable from riparian or littoral uplands in this State. See 476 So. 2d at 651-52; See also § 253.141(1), Fla. Stat. (2005) . . . . Today, the majority has returned to a "hopelessly illogical hypothesis" without even an attempt to advance some rational analysis that conforms to the Florida Constitution, our common law, and section 253.141, Florida Statutes.

Pet. App. 45.

Finally, Respondents cannot cite any Florida case that allows a government to fix a permanent boundary between sovereign submerged lands and littoral uplands thereby severing littoral property from the MHWL. The only Florida cases addressing this issue have found such schemes unconstitutional. *Florida National,* 338 So.2d at 18 ("An inflexible meander demarcation line would not comply with the spirit or letter of our Federal or State Constitutions . . . .")[14]; *see also Medeira Beach*, 272 So.2d at 213 ("Freezing the boundary at a point in

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[14] In *Florida National*, the "State concede[d] the invalidity of the boundary-setting" scheme. 338 So.2d at 19 (England, J., concurring in part and dissenting in part).

time" leaves riparian owners "in danger of losing access to water which is often the most valuable feature of their property . . . ." (quoting *Hughes*, 389 U.S. 290, 293-94)).

Curiously, the opinion below fails to acknowledge *Florida National*, which held that a boundary-fixing scheme materially identical to the ECL in this case was unconstitutional. *Florida National*, 338 So.2d at 18. The Florida Supreme Court has suddenly and dramatically altered the core foundation upon which littoral rights have rested in Florida for a century.

B. The littoral right to future accretions has been taken.

Respondents misrepresent that no Florida precedent holds that a littoral owner is entitled to future accretions as opposed to past accretions. *See* DEP Brief p. 49; County Brief p. 32-34. To the contrary, the Florida Supreme Court has twice **expressly recognized** that the common law right to accretion includes the right to existing **and future accretions**.

In *Sand Key*, the Florida Supreme Court "approve[d] the district court decision" that held "the disputed five acres of accreted property, **all future accretions on the property** and all property rights incident thereof belong to Sand Key." *Sand Key*, 512 So.2d at 941 (emphasis added) (quoting *Sand Key Assocs., Ltd. v. Bd. of Trs.*, 458 So.2d 369, 371 (Fla. 2d DCA 1984)). As support, the Florida Supreme Court quoted this Court's statement in

County of St. Clair v. Lovingston, 90 U.S. 46, 68-69 (1874):

> *The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property.* The title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase. The right is a natural, not a civil one.

Sand Key, 512 So.2d at 937 (emphasis in original).

The Florida Supreme Court also expressly recognized in *Florida National* that the littoral right to accretion **is a present right to acquire future property.** The court held "the State, through the Trustees, claims not only the lands to which Plaintiff has already gained title through the operation of accretion and reliction, **but also seeks to deny to Plaintiff the right to acquire additional property in the future through the process of accretion and reliction**." *Florida National*, 338 So.2d at 17 (emphasis added).[15]

The right to future accretion has always been part of the littoral right to accretion. The holding below that the right to accretion "is a *contingent, future interest*"[16] not worthy of immediate protection

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[15] Despite the Florida Supreme Court's affirming of the trial court's judgment, *id.* at 18-19, Respondents try to dismiss it is dicta. County Brief, p. 34; DEP Brief, p. 43-45.

[16] Pet. App. 20 (emphasis added).

is a judicial invention of a non-existent rule of state substantive law designed to avoid a taking. In short, it is a fiction with no basis in background principles of Florida law.

III. No Background Principles of State Law Justify the Court's Changing 100 Years of Law.

In an attempt to identify some "background principle of state law" to justify the change of law wrought below, Respondents assert that beach restoration is "artificial avulsion" under the common law. *See* DEP Brief p. 17-19; County Brief, p. 37-39. Not one Florida case holds the common law doctrine of avulsion applies to artificial or man-induced, intentional events, or even mentions the words "artificial avulsion."

No such principle exists and no background principles of Florida law address "artificial avulsion." In Florida, avulsion is the "sudden or perceptible loss of or addition to the land **by action of the water** . . . ." *Sand Key*, 512 So.2d at 936 (emphasis added); *accord Siesta Props., Inc. v. Hart*, 122 So.2d 218, 224 (Fla. 2d DCA 1960) (Avulsion is caused by "the sudden or violent action of the elements . . . .").[17]

DEP argued below that the restoration should be treated as avulsion relying on *Martin v. Busch*,

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[17] A hurricane (a natural event) caused the avulsion in the only case cited by Respondents. *See Bryant v. Peppe*, 238 So.2d 836, 837 (Fla. 1970).

112 So. 274 (Fla. 1927).[18] The Florida Supreme Court rejected DEP's argument not even mentioning *Martin* in its opinion because it is not applicable to this case.[19]

The Florida Supreme Court has held that the argument DEP now advances to this Court misrepresents its holding in *Martin*. When DEP previously argued that *Martin* allowed the separation of the upland from the ordinary high water line thereby extinguishing riparian rights, the Florida Supreme Court admonished:

> We reject [DEP's] contention that the dicta in *Martin* means that riparian owners are divested, **not only of their riparian or littoral right to accretions, but also of their property's waterfront characteristics.** This Court expresses no such intent in *Martin v. Busch*, and, in fact, the concurring opinion states that ***Martin* does not involve the rights to accretion and reliction**. . . .

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[18] Amended Initial Brief of the Department of Environmental Protection and Board of Trustees of the Internal Improvement Trust Fund at 25-29, *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So.2d 1102 (Fla. 2008) (No. SC06-1449); Reply Brief of the Department of Environmental Protection and Board of Trustees of the Internal Improvement Trust Fund at 8-11, *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102 (Fla. 2008) (No. SC06-1449).

[19] The opinion in *Martin*, 112 So. 274, never mentions or references the doctrine of avulsion.

> Our subsequent decisions show there was no intent to change common law principles regarding the right to accretions and relictions.

Sand Key, 512 So.2d at 940-941 (emphasis added) (citation omitted).

Neither *Martin* nor any other Florida case alludes to, much less establishes, any background principle of Florida law to support Respondents' "artificial avulsion" theory.[20]

IV. Judicial Takings Test and Proper Standard of Review.

A. Respondents essentially concede a judicial takings test should be recognized.[21]

A judicial taking occurs when the decision of a state court effects a "sudden change in state law, unpredictable in terms of the relevant precedents."

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[20] Even if the doctrine of avulsion was applicable, it includes the right of either the littoral owner or the state as owner of submerged lands to reclaim the boundary line that was lost. Pet. App. 31 (recognizing right of riparian to reclaim land and rights lost resulting from avulsion). The purpose of the right of reclamation is to restore the parties to the pre-avulsive status quo (i.e., a MHWL boundary line). *See* Frank E. Maloney, *Water Law and Administration* 393 (1968); Herbert Thorndike Tiffany, *A Treatise on the Law of Real Property* 1153-55 (1912); Henry Philip Farnham, *The Law of Waters and Water Rights* 1639-40 (1904).

[21] *See* DEP Brief, p. 54; County Brief, p. 25.

Hughes, 389 U.S. at 296 (Stewart, J., concurring). Whether such a change has occurred should be determined "not by what a State [court] says, or by what it intends, but by what it does." *Id.* at 298; *accord Lawrence v. State Tax Comm'n*, 286 U.S. 276, 280 (1932) (passing on constitutionality of state tax "we are concerned only with its practical operation," not how the Mississippi Supreme Court defined it "or the precise form of descriptive words" used). Thus, this Court's duty, as described by Justice Stewart, is to analyze the state court's precedents to ascertain what the state's ruling does.[22]

B. Standard of Review.

The proper standard of review is the "fair or substantial basis" standard. This Court has repeatedly applied this standard to review state court decisions regarding state law. *Broad River Power Co. v. South Carolina ex rel. Daniel*, 281 U.S. 537, 540-43 (1930) (recognizing a fairness component and a substantial component); *Howlett v. Rose*, 496 U.S. 356, 366 n.14 (1990) ("[W]e have long held that this Court has an independent obligation to ascertain whether a judgment defeating the enforcement of federal rights rests upon a valid nonfederal ground and whether that ground finds 'fair or substantial support' in state law.").

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[22] While several amici suggest that there would be too many unanswered questions if a judicial takings doctrine is adopted, they do not justify or explain why a state court judge should be allowed to violate the federal constitution with impunity when its co-equal branches of state government cannot.

In the takings context, this Court's:

> jurisprudence requires us to analyze the 'background principles' of state property law to determine whether there has been a taking of property in violation of the Takings Clause. That constitutional guarantee would, of course, afford no protection against state power if our inquiry could be concluded by a state supreme court holding that state property law accorded the plaintiff no rights. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 . . . (1992).

Bush v. Gore, 531 U S. 98, 115 n.1 (2000) (Rehnquist, C.J., concurring); *Cohen v. California*, 403 U.S. 15, 19-23 (1971) (finding state court decision did not have a fair or substantial basis); *accord Bouie v. City of Columbia*, 378 U.S. 347, 356 (1964); *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 456 (1958); *Ward v. Board of County Comm'rs*, 253 U.S. 17, 22 (1920).

This Court should rigorously apply its fair or substantial basis standard where, as here, the State itself is interested in the outcome, 16B Wright & Kane, *Federal Practice & Procedure* § 4030 p. 422 (2d. ed. 1996) ("[I]f the state itself is interested in the outcome, the Court should exercise a more searching review"); the government action is "an apparent sham," *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*, 545 U.S. 844, 865 (2005); and two dissenting justices of the Florida

Supreme Court have exposed the majority's fiction, Pet. App. 41-42.[23]

Respondents seek to weaken this Court's traditional "fair or substantial basis" standard by suggesting a "fair basis" standard be applied with super deference. Respondents suggest, in effect, that any statement made by a state court should be conclusive and this Court should look no deeper than the words printed in the *Southern Reporter*.[24] This proposed standard is so deferential it constitutes no review at all.

The federal constitution and this Court's jurisprudence require more. Otherwise, only a state court with a "stupid staff" will commit a judicial taking. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1025 n.12 (1992) (harm-preventing

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[23] A meticulous review is even more important when state judges are elected or retained by public votes. *See England v. Bd. of Medical Exam'rs*, 375 U.S. 411, 427 (1964) (Douglas, J., concurring) ("federal judges appointed for life are more likely to enforce the constitutional rights of unpopular minorities than elected state judges."); *accord Stone v. Powell*, 428 U.S. 465, 525 (1976) (Burger, C.J., concurring).

[24] Respondents argue that this Court should find that any decision that is "principled" must have a "fair basis." *See* County Brief p. 30. A decision by a state court, no matter how well reasoned or principled, cannot contravene a constitutional provision.

For example, the New York law at issue in *Loretto* was principled with a rational basis and legitimate public purpose. Such facts, however, can never justify the violation of a constitutionally protected right. Respondents are asking for precisely that result, in essence suggesting this is a "minor" rather than a "major" taking. The Constitution knows no such distinctions. *Loretto*, 458 U.S. at 421.

justification suggested by dissent for regulatory taking "amounts to a test of whether the legislature has a stupid staff" and is insufficient under the Takings Clause); *Kelo v. City of New London*, 545 U.S. 469, 502 (2005) (O'Connor, J, dissenting) ("difficult to envision anyone but the 'stupid staff[er]' failing" a test to determine whether a takings was for an "illicit purpose").

Relevant Florida precedents lead to the unmistakable conclusion that the opinion below has no fair or substantial basis in background principles of Florida law. Rather, the Florida Supreme Court dramatically eliminated Florida property rights and must be reversed.[25]

V. The Restoration Project Is Not Compensation Under The Constitution.

The claim that the restoration is an "enormous" benefit to STBR members is a fallacy, as is the suggestion that the restoration more than compensated STBR's members even if a taking did occur. No record evidence supports these

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[25] Respondents' suggestion that federalism concerns weigh against a judicial takings doctrine ignores that this Court has always reviewed state court rulings for compliance with the U.S. Constitution. *See* Petitioner's Brief p. 48-49. STBR asks this Court to only do what it did in *Webb's Fabulous Pharmacies, Inc. v. Beckwith* ("*Webb's*"), 449 U.S. 155, 159 n.5 (1980). That is, prevent a state court from transforming private property into public property by court decree. No "federalism" concern was mentioned in *Webb's* and no such concern should exist here.

assertions.[26] Rather, the record indicates that STBR's members' property is located on an accreting beach.[27] Thus, the supposed benefit of no longer bearing the risk of erosion is inapplicable to this case.[28]

In any event, the measure of a taking is not how much benefit the government might confer to property retained by the landowner. *See Peebles*, 254 So.2d at 233-34 ("Privileges, such as the right to access to the [lake], which are merely permissive and subject to revocation by the condemning party at any time cannot be availed of in reduction of damages."). Thus, Florida Statutes Section 161.201, which replaces a common law property right of access with a statutory right of access, is no "benefit."

This is not a case where a landowner's property is about to collapse into the ocean. If it were, landowners would likely waive any right to compensation in exchange for beach restoration. This reality dispels the "sky is falling" scenarios urged by Respondents that reversal of the opinion below would end beach restoration. Instead, a ruling in favor of STBR will ensure that the government will use restoration for legitimate projects and not as

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[26] DEP's Brief frequently cites factual information not in the record, see DEP's Br. nn.3-5, 8, 24, 28-34, 38-41, 42, 45-46, & 53, which should not be considered. *New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970).

[27] App. 252, 261.

[28] Respondents continue to misrepresent that the ECL will automatically disappear if the newly created beach is not continually renourished. *See* Fla. Stat. § 161.211(3).

a pretext to convert private beaches to public beaches.

VI. STBR Raised All Questions Presented And Respondents Waived Their Right To Object.

A. STBR raised the federal taking and due process claims below.

STBR raised the federal taking and due process claims (i.e., Questions Presented II and III) in its Motion for Rehearing. There, STBR argued the:

> [Act] and the Court's opinion allow for the complete elimination of **all** littoral rights and replaces them with inferior statutory rights, which is a wholesale violation of the United States Constitution.
>
> * * *
>
> Court's opinion . . . is a taking under the Fourteenth Amendment to the United States Constitution.

Pet. App. 141-42.

In *Webb's*, 449 U.S. at 159 n.5, a unanimous Court found that a federal takings issue was raised in oral argument and considered by the Florida Supreme Court from the mere mention of the words "taking without due process of law" and a finding of "no unconstitutional taking" in its opinion. If *Webb's*

properly presented a federal issue, then one is certainly presented here considering the numerous citations of federal case law by the Parties and the arguments in STBR's Motion for Rehearing.

Moreover, a petitioner need only raise the federal question at the first reasonable opportunity. *Richards v. Jefferson County*, 517 U.S. 793, 797 n.3 (1996) (petitioners timely raised due process challenge in application for rehearing to state high court); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-78 (1930) (federal constitutional claim first raised in a petition for rehearing); *Saunders v. Shaw*, 244 U.S. 317, 320 (1917) (due process challenge to state high court's decision brought in a second petition for rehearing). STBR timely raised its federal takings claims.

Additionally, the raising of a state takings claim includes a federal takings claim where the state and federal provisions are construed coextensively.[29] *See County FSC Brief*, *supra* note 3, at 16 (admitting the provisions are construed consistently). *See Howell v. Miss.*, 543 U.S. 440, 444

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[29] "Both the 14th Amendment to the United States Constitution and Article I, Section 9, of the Florida Constitution prohibit the taking of property without due process of law. We consider the federal and Florida constitutional guarantees as imposing the same standard and will discuss them as one." *Fla. Canners Ass'n v. Dep't of Citrus*, 371 So.2d 503, 513 (Fla. 2d DCA 1979), *aff'd sub nom., Coca-Cola Co. v. Dep't of Citrus*, 406 So.2d 1079 (1981), *appeal dismissed sub nom., Kraft, Inc. v. Dep't of Citrus*, 456 U.S. 1002 (1982); *accord Burgos v. Univ. of Fla. Bd. of Trus.*, 283 F. Supp. 2d 1268, 1271 n.4 (M.D. Fla. 2003).

(2004) (a "federal claim [could be raised] by implication [when] the state-law rule" is "identical" or "virtually identical"). Where state courts have "interpreted the relevant state takings law coextensively with federal law, petitioners' federal claims constituted the same claims that had already been resolved in state court." *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 335, 339 (2005) (recognizing state and federal issues were "functionally identical"). In fact, *San Remo* requires STBR to appeal the opinion below to this Court, as it precludes litigating the functionally identical federal claim in federal district court. Consequently, STBR's claims for a federal taking are properly before this Court.

B. Even if not addressed below, STBR's claims are properly before this Court.

Respondents rely on *Adams v. Robertson*, 520 U.S. 83 (1997), for the proposition that "[w]ith only 'very rare' exceptions, this Court lacks jurisdiction and will not consider claims not addressed or passed upon below." DEP Brief, p. 62; County Brief p. 19. Yet, Respondents ignore that this case falls squarely within the noted exceptions.

This Court has held federal claims to be "adequately presented even though not raised in lower state courts when the highest state court renders an unexpected interpretation of state law or reverses its prior interpretation." *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 86 n.9 (1980) (allowing a federal procedural due process claim where state high court overruled a previously well-

established precedent, thereby denying petitioner of any possibility of state judicial relief) (citing *Brinkerhoff-Faris*, 281 U.S. at 677-78).[30]

Here, the Florida Supreme Court rendered "an unexpected interpretation of state law" and reversed prior interpretations depriving STBR of any meaningful state judicial relief. Accordingly, under the exception quoted above, Questions II and III were properly raised below.

In addition, even if an issue was not decided by the court below, this Court can and will consider the issue if it is "predicate to an intelligent resolution" of the question properly presented. *Ohio v. Robinette*, 519 U.S. 33, 38 (1996). The federal taking and procedural due process issues are a predicate to an intelligent resolution of the judicial takings question presented. The question whether the remaining procedures left in the Act comply with due process or result in a taking only arises because the Florida Supreme Court determined that the eminent domain requirement of Florida Statutes Section 161.141 is not applicable (because no littoral property rights existed to be taken).

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[30] *Accord Mo. ex rel. Mo. Ins. Co. v. Gehner*, 281 U.S. 313, 320 (1930) (state high court effected an unexpected interpretation of law), *disapproved on other grounds*, *U.S. v. Atlas Life Ins. Co.*, 381 U.S. 233 (1965); *Saunders*, 244 U.S. at 320 (allowing a due process challenge where "the act complained of [was] the act of the [state high] court, done unexpectedly at the end of the proceeding"); *see also Richards*, 517 U.S. at 797 n.3; *Terminiello v. City of Chicago*, 337 U.S. 1, 5-6 (1949); *Great N. Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 367 (1932).

C. Respondents waived any objection to the questions presented under Rule 15.2.

Respondents' argument that Questions II and III were not properly presented to the state court below is too late. This Court's Rule 15.2 requires counsel "to point out in their brief in opposition, and not later, any perceived misstatement in the petition . . . that bears on what issues properly would be before the Court if the petition were granted." *See Adams*, 520 U.S. at 92 n.5 (Rule 15.2 duty is an independent obligation upon counsel).

Respondents did not "point out" or even "hint" that Questions II and III were not proper in their briefs in opposition. This Court held:

> [R]espondent's brief in opposition did not hint that the "questions presented" might not be properly preserved. Respondent's attempt to avoid the question now comes far too late. . . . [D]efects of this sort should be brought to our attention *no later* than in respondent's brief in opposition to the petition for certiorari . . . .

City of Oklahoma v. Tuttle, 471 U.S. 808, 815 (1985); *Knowles v. Iowa*, 525 U.S. 113, 116 n.2 (1998) (refusing to consider government's preservation issue argument because that argument was "waived" by the government's failure to raise it in the brief in opposition).

Respondents did not object to Questions II and III until after this Court granted certiorari. *See Carcieri v. Salazar*, 129 S.Ct. 1058, 1068 (2009) (rejecting belated objection to facts in brief on the merits under Rule 15.2). Accordingly, Respondents have waived any objection to the Questions II and III and the Court should consider all questions presented.

VII. Miscellaneous Issues.

A. Alleged abandonment of the ECL challenge.

STBR initially challenged all technical aspects of the ECL, including how it was set, whether it was set in the proper location, etc. It became apparent, however, the exact location of the ECL was irrelevant. Rather, it is the mere existence of the ECL – wherever established in relation to the MHWL – that makes it unconstitutional.

Whether the ECL is landward or seaward of the MHWL, the effect is the same. The ECL severs the littoral owner from the MHWL without compensation. Thus, there was no need for STBR to challenge such irrelevant aspects of the ECL.

B. Alternative remedy – circuit court case.

Respondents also suggest that STBR should have pursued its as-applied takings claim in circuit court and STBR failed to pursue available remedies. These suggestions are misleading. STBR was required under state law to pursue its as-applied

challenge **only** in the district court of appeal following DEP's issuance of its Final Order. *Key Haven Associated Enters., Inc. v. Bd. of Trs.*, 427 So.2d 153, 158 (Fla. 1982) (an as-applied constitutional challenge to agency action must be appealed to the district court and not filed in circuit court). STBR's circuit court action only alleged a **facial** constitutional challenge, again as required by state law. *Id.*

Furthermore, DEP sought and obtained the order staying the circuit court action – over objection of STBR – claiming the issues in this case and the circuit court case are interdependent. *See* Defendants' DEP and Board of Trustees of the Internal Improvement Fund Motion to Hold Case in Abeyance at 4-5, *Save Our Beaches, Inc. v. Bd. of Trs.*, No. 04-2093 (filed Jan. 23, 2007) (noting STBR's objection). After erecting this barrier, Respondents cannot now assert STBR could and should have pursued this lawsuit.

CONCLUSION

The Florida Supreme Court has abused its authority to define property by "redefining" STBR's members' 100 year-old property rights out of existence. This Court must look beyond what the opinion below says, to determine what it **does**. *Hughes*, 389 U.S. at 297-98.

The Florida Supreme Court's opinion effects a "sudden change in state law, unpredictable in terms of the relevant precedents" in violation of the U.S. Constitution. This Court should reverse the Florida Supreme Court's Opinion finding its current ruling

constitutes a federal taking and remand this case for further proceedings consistent therewith.

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
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In the Supreme Court of the United States

STOP THE BEACH RENOURISHMENT, INC., PETITIONER

v.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

The United States will address the following question:

Whether a Florida Supreme Court decision determining petitioner's members' littoral property rights under the State's common law effected a judicial taking of property requiring compensation under the Just Compensation Clause of the United States Constitution.

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FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This case concerns whether a state judicial decision may effect a taking of property for purposes of the Just Compensation Clause. The federal government often defends against takings claims and, in so doing, relies upon background principles of property law. Also, because the Federal Emergency Management Agency provides flood insurance to many coastal property owners through the National Flood Insurance Program, the United States has an interest in ensuring that state and local governments are able to protect coastal property against hurricanes and storms.

STATEMENT

1. In Florida, as in the States generally, submerged lands under navigable waters are held by the State as a fundamental aspect of its sovereignty and as a means of serving vital public purposes. Pet. App. 13-16; see, *e.g.*, *Montana* v. *United States*, 450 U.S. 544, 551, 552 (1981) ("ownership of land under navigable waters is an incident of sovereignty" and control over it is "strongly identified with the sovereign power of government"); *United States* v. *Alaska*, 521 U.S. 1, 34-35 (1997) (involving lands granted to States by Submerged Lands Act, 43 U.S.C. 1301 *et seq.*). The Florida Constitution expressly provides that "[t]he title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people." Art. X, § 11.

The Florida Constitution also directs the State to conserve and protect its natural resources. See Art. II, § 7(a). The beaches along Florida's coastline are among the most critical of these resources. The beaches serve as buffers to protect homes and businesses on the shore from storms, provide the cornerstone for the State's tourism industry, and support a wide variety of plant and animal life, including threatened and endangered species. J.A. 74.

Florida's beaches have been severely eroded in recent years by hurricanes and tropical storms. J.A. 73. Approximately 387 miles of the State's 825 miles of sandy beaches have experienced "critical erosion," meaning "a level of erosion which threatens substantial development, recreational, cultural, or environmental interests." Fla. Dep't of Envtl. Prot., *Beach Erosion Control Program (BECP)* (last modified Sept. 1, 2009)

<http://www.dep.state.fl.us/beaches/programs/bcherosn.htm>. The Legislature has determined that "beach erosion is a serious menace to the economy and general welfare of the people of this state and has advanced to emergency proportions." Fla. Stat. Ann. § 161.088 (West 2006).

2. The Beach and Shore Preservation Act (Act), Fla. Stat. Ann. §§ 161.011 *et seq.*,[1] was enacted to protect the State's beaches and shorelines, as well as upland property. The Act authorizes state and local governments to undertake projects to restore and renourish critically eroded beaches. *Id.* §§ 161.088, 161.161. Restoration is the placement of sand to rebuild a beach after it has been eroded, and renourishment is the maintenance of a restored beach by further addition of sand. *Id.* § 161.021(3)-(4); see J.A. 99.

a. Respondent Florida Department of Environmental Protection (Department) is responsible for identifying beaches that are critically eroded. Fla. Stat. Ann. § 161.161(1). A local government may apply for approval to restore a critically eroded beach. J.A. 75, 142-143. The Department is then responsible for issuing coastal construction and environmental permits, and respondent Board of Trustees of the Internal Improvement Trust Fund (Board) must authorize the use of the State's submerged lands, on which sand will be deposited to restore and renourish the beach. Fla. Stat. Ann. §§ 161.161(3) and (5), 161.191(1); Pet. App. 64-65.

Once an application is received, the Board surveys the beach and establishes an erosion control line (ECL). Fla. Stat. Ann. § 161.161(3)-(5). The ECL is generally

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[1] Unless otherwise noted, all citations to the Act are to the 2006 edition of Florida Statutes Annotated (West).

set by reference to the then-existing mean high water line (MHWL). *Id.* § 161.161(5). The MHWL is the boundary between the land and sea, *id.* § 177.27(14)-(15) (West 2000), which ordinarily serves as the dividing line between upland coastal property and the submerged lands owned by the State, *id.* § 177.28(1) (West 2000); *Kruse* v. *Grokap, Inc.*, 349 So. 2d 788, 789-790 (Fla. Dist. Ct. App. 1977). The MHWL shifts gradually over time as a result of the movement of sand (accretion or erosion) or the rising or falling of sea level (reliction). See *Board of Trs. of the Internal Improvement Fund* v. *Sand Key Assocs., Ltd.*, 512 So. 2d 934, 936-937 (Fla. 1987). By setting an ECL, the State fixes the boundary between the State's lands and the uplands. Fla. Stat. Ann. § 161.141 (West Supp. 2009); Fla. Stat. Ann. §§ 161.151(3), 161.191; J.A. 87-89.

Once the ECL is fixed, restoration proceeds. New beach is created by dredging sand from submerged lands offshore and depositing it on the State's submerged lands from the ECL seaward. J.A. 77-78, 108-110. That additional beach creates a buffer between the ocean and upland properties. Fla. Stat. Ann. §§ 161.101(1), 161.161; Fla. Stat. Ann. § 161.141 (West Supp. 2009); see J.A. 76-77. If erosion thereafter causes the water line to advance toward the ECL, the sponsoring local government must add sand in the buffer zone area. Fla. Stat. Ann. § 161.211(2)-(3).

b. The Act expressly provides certain rights to owners of upland property. The local government may not expand the newly created beach beyond the area identified in the survey without their written consent. Fla. Stat. Ann. § 161.191(2). No construction may occur on any lands that are created seaward of the ECL, except as necessary to prevent erosion; and no activity "injuri-

ous to the person, business, or property" of the upland owner is allowed on such lands. *Id.* § 161.201. In addition, although the upland owner's property will not extend seaward out across the new beach created on the State's submerged lands, the upland owner "shall, nevertheless, continue to be entitled to all common-law riparian rights except as otherwise provided in [§] 161.191(2), including but not limited to rights of ingress, egress, view, boating, bathing, and fishing." *Ibid.* Because the project establishes new beach on the State's submerged lands and fixes the State/upland boundary, "the common law shall no longer operate to increase or decrease the proportions of any upland property lying landward of such line, either by accretion or erosion or by any other natural or artificial process." *Id.* § 161.191(2).

c. The Act provides an owner of upland property with two different avenues to seek judicial relief. First, the owner may bring an action under the Florida Administrative Procedure Act, Fla. Stat. Ann. § 120.68(2) (West 2008), to challenge the final permit decision on the ground that it is not in accordance with existing statutes or rules or is not based on substantial evidence. Fla. Stat. Ann. § 161.212(2). Second, an owner substantially affected may file an action in circuit court seeking damages on the ground that the "final agency action is an unreasonable exercise of the state's police power constituting a taking without just compensation." *Ibid.*[2]

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[2] If a restoration project cannot "reasonably be accomplished" without taking private property, the sponsoring local government must institute an eminent domain proceeding. Fla. Stat. Ann. § 161.141 (West Supp. 2009). This provision would apply, for example, if engineering constraints required part of the ECL to be set landward of the MHWL, on the property of the upland owner. See State Resp. Br. 8 n.10.

d. Approximately 45 projects have been authorized under the Act, resulting in restoration of more than 20% of Florida's coastline. J.A. 82.

3. In 2003, respondents City of Destin (City) and Walton County (County) applied for a permit to restore 6.9 miles of beach in the Florida panhandle. J.A. 28, 191-192. That stretch of beach was battered by Hurricanes Erin and Opal in 1995, Hurricane Georges in 1998, and Tropical Storm Isidore in 2002, and had been designated as critically eroded. J.A. 30, 84-85, 163-164; Pet. App. 4 n.4, 106. Petitioner, an organization comprised of six persons who own property bordering the project area, filed an administrative challenge to the proposed permit. J.A. 10-26, 42-48; see Pet. App. 113. Petitioner contended, *inter alia*, that the Department had not properly located the ECL and that the project "results in a taking." J.A. 20, 22, 46-47. In petitioner's view, the project would take two littoral rights of its members: the right to add to their property through future accretions (because the ECL fixes the boundary between State and private lands) and the right to maintain contact with the water (because the waterline would be beyond the ECL, on the seaward side of the newly created beach on the State's land). J.A. 60, 211.

While petitioner's administrative challenge was pending, Hurricane Ivan struck, significantly eroding the beach at issue. See J.A. 187, 200. As a result, petitioner expressly "abandoned [its] challenge to the beach-related technical aspects" of the project, including its challenge to the location of the ECL. J.A. 53.

4. Although the administrative proceeding was still pending, petitioner filed an action in circuit court under Fla. Stat. Ann. § 161.212(2), alleging that the Act violates the just compensation and due process provisions

in the federal and state constitutions, on its face and as applied. See Am. Compl. at 5-14, *Save Our Beaches, Inc.* v. *Board of Trs. of the Internal Improvement Trust Fund*, No. 2004-CA-2093 (Fla. 2d Cir. Ct. Feb. 3, 2005). The parties then agreed to dismiss the constitutional claims from the administrative challenge. J.A. 264; Pet. App. 104, 115. An administrative law judge rejected petitioner's remaining challenges and recommended approval of the permit. Pet. App. 101-135. The Department approved the permit, *id.* at 88-100, and the project was commenced.[3]

In petitioner's takings suit in state circuit court, the parties filed cross-motions for summary judgment. The court denied the motions on the ground that the factual record was inadequate to determine whether petitioner had a viable takings claim. Order at 22-23, *Save Our Beaches*, *supra* (No. 2004-CA-2093) (July 20, 2005). The case has been held in abeyance since June 2007.

5. Petitioner challenged the Department's final order in the district court of appeals under the Florida Administrative Procedure Act. Petitioner contended that the project would unconstitutionally take its members' rights to receive any accretions that might occur in the future and to maintain contact with the water, without just compensation. Pet. App. 61-62. The court of appeals agreed, *id.* at 77-86, but certified that question to the Florida Supreme Court, *id.* at 2.

6. The Florida Supreme Court reversed. Pet. App. 1-60. The court treated petitioner's challenge as a facial challenge to the Act, and it rejected that challenge on the ground that the establishment of an ECL does not

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[3] Respondents completed the restoration in 2007. See State Resp. Br. 28 n.46.

take any common-law littoral rights of upland property owners without just compensation. *Id.* at 2-3, 12, 28-29.

The court acknowledged that the Act replaces the ambulatory boundary between an upland property and the State's sovereign lands (the MHWL) with a fixed boundary (the ECL), and that as a result, upland property owners will no longer gain or lose property due to natural processes such as accretion or erosion. Pet. App. 16-27. The court explained, however, that littoral property owners have no vested right to receive future accretions and that instead "[t]he right to accretion and reliction is a contingent, future interest that only becomes a possessory interest if and when land is added to the upland by accretion or reliction." *Id.* at 20; see *id.* at 34. The court further explained that the common-law rule that accretions inure to the upland owner is a "rule of convenience intended to balance public and private interests," and the rationales for that rule do not apply in the context of a beach restoration project, where the creation of a fixed boundary between state and private property protects the upland owner from losses due to erosion. *Id.* at 34-35.

The court also held that the Act does not unconstitutionally deprive upland owners of an asserted right to maintain contact with the water. Pet. App. 35-39. The court explained that, although it had previously found a compensable taking based on interference with an upland owner's right of access to the water, it had never before held that an upland owner has an independent right to maintain contact with the water. *Id.* at 36. The court noted that the Act expressly preserves the upland owner's common-law right of access, *id.* at 37 (citing Fla. Stat. Ann. § 161.201), and determined that there is no

independent "right to maintain a constant boundary with the water's edge," *id.* at 37-38.

The court therefore upheld the Act on its face. Pet. App. 40. Two Justices dissented. See *id.* at 40-58 (Wells, J., dissenting; Lewis, J., dissenting).

Petitioner filed a petition for rehearing, arguing that the Florida Supreme Court's decision effected a judicial taking of property without just compensation in violation of the federal Constitution. Pet. App. 140-148. The Florida Supreme Court denied the petition. *Id.* at 136-137.

SUMMARY OF ARGUMENT

A. This Court has never held that a state judicial decision may effect a taking under the Just Compensation Clause. There is good reason for the Court's hesitation. The text of the Clause counsels against such a claim, because it commits the definition of "private property" to independent sources, such as state law. It would be anomalous to hold that a decision defining state property rights also itself "takes" property. Nor does the historical understanding of what constitutes a taking support a judicial takings theory. And there are numerous jurisprudential and practical problems with recognizing such claims. They could unduly cabin the discretion of state courts to adapt the State's property law to new circumstances, upset the federal-state balance by assessing liability based on judicial decisions rather than on legislative and executive action, and encourage relitigation of property disputes as judicial takings.

B. If a judicial takings claim were ever to be recognized, this is not the case in which to do it. In the Florida courts, petitioner's complaint was that the Act,

as implemented, unconstitutionally takes certain littoral rights. That is a conventional takings claim challenging legislative and executive action. Only after petitioner lost in the Florida Supreme Court did it recast its claim as one for a judicial taking. The Court should not recognize a judicial takings claim when the property owner could present a conventional takings claim. Further, petitioner's judicial takings claim has never been considered by any court in this litigation. Petitioner has not pursued compensation for an alleged taking through available state procedures. And the record contains little of the detail that would be necessary to consider a takings claim.

C. If this Court were to recognize a judicial takings claim, it should only be when a state court radically and unexpectedly deviated from settled state property law, and the decision's impact is so substantial as to constitute a taking under conventional analysis. The decision of the Florida Supreme Court is not in that category, because it applied settled common-law principles to the particular situation of a beach restoration project. No prior decision had held that upland owners possessed property rights to receive future accretions and maintain contact with the water, as against the State's interests in filling its own submerged lands to protect beach resources and upland property. To the contrary, several prior decisions recognized the State's right to create dry lands out of submerged lands and retain title to them, which would preclude upland property from experiencing future accretions (or erosions) and maintaining direct contact with the water.

D. No takings liability would lie in any event because the loss of rights claimed by petitioner is not sufficiently severe to constitute a taking. The loss of future accre-

tions and contact with the water does not qualify as a *per se* taking. The State neither altered the boundaries of upland parcels nor physically invaded them. And petitioner does not claim that the restoration project deprived these lands of all economic value.

Nor could the loss of the claimed littoral rights result in a regulatory taking. Petitioner has made no attempt to quantify the burden of the beach restoration project on members' properties. In fact, the purpose and effect of the beach restoration project is to *protect* upland owners by buffering them from storms and hurricanes.

ARGUMENT

THE FLORIDA SUPREME COURT DID NOT TAKE PROPERTY OF PETITIONER'S MEMBERS WITHOUT JUST COMPENSATION

Petitioner asks this Court to hold that a state judicial decision interpreting state property law—in itself, and independent of any concrete measures taken by the other branches of government—has effected a taking that requires the payment of just compensation under the Fifth and Fourteenth Amendments. This Court has never found a taking in those circumstances, and there are good reasons for the Court's hesitation.

This Court need not decide whether to recognize a judicial takings claim, however, because petitioner's claim is not properly analyzed as one for a judicial taking. This case was litigated in the Florida courts on the theory that the Beach and Shore Preservation Act, as implemented, resulted in a taking of property. That is a conventional takings claim, which this Court should

not allow to be repackaged as a challenge to judicial interpretation.[4]

In any event, petitioner cannot succeed on a judicial takings claim. The Florida Supreme Court's decision did not constitute any sudden or dramatic change in the law concerning the two littoral rights asserted by petitioner's members. And even if it had, the infringement does not constitute a compensable taking under this Court's precedents.

A. The Court Should Exercise Restraint Before Concluding That A State Supreme Court Decision Interpreting State Property Law In Itself Effects A Taking

This Court has never held that the decision of a state supreme court interpreting state law affecting property rights has effected a taking. A number of considerations counsel caution before the Court takes that unprecedented step.

1. The text of the Just Compensation Clause provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. Amend V. That text places a condition on the taking of private property—if private property is taken for public use, compensation must be paid. See, *e.g.*, *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 536-537 (2005).

The constitutional text does not define "property" or confer any property interests; instead, property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Board of Regents of State Colls.* v. *Roth*, 408 U.S. 564, 577 (1972). Because

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[4] There is a substantial question whether any conventional takings claim—or any other claim—is properly before this Court. See City/County Resp. Br. 19-25.

the Just Compensation Clause is based on the presumption that property interests will be defined by state law,[5] and because state courts are the expositors of state law, it would be anomalous to hold that a state court decision that has interpreted state law concerning property simultaneously "takes" that very property. See, *e.g.*, *Phillips* v. *Washington Legal Found.*, 524 U.S. 156, 164 (1998) ("[T]he Constitution protects rather than creates property interests."); see also *Georgia* v. *Randolph*, 547 U.S. 103, 144 (2006) (Scalia, J. dissenting) (discussing *Phillips*).

2. The historical evidence suggests that the Framers viewed the Just Compensation Clause as confined to the government's physical appropriation of private property for public use by eminent domain. See, *e.g.*, *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992); 1 St. George Tucker, *Blackstone's Commentaries: with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* 305-306 (1803); see also William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 790-791, 836-840 (1995). Those physical appropriations were traditionally undertaken by the legislature, 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1784, at 661 (1833), and executive agencies are now often authorized to do so. But it was well understood that courts did not have the independent authority to exercise the power of eminent domain. See, *e.g.*, 1 William Blackstone, *Commentaries* *135. A court's exposition of state property

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[5] The parties do not rely on federal law to determine the littoral property interests. Cf. *Hughes* v. *Washington*, 389 U.S. 290 (1967); *Thiesen* v. *Gulf, Fla. & Ala. Ry.*, 78 So. 491, 503-505 (Fla. 1918).

law lies far afield from a claim for compensation based on the traditional exercise of eminent domain.

Of course, the original understanding of the Just Compensation Clause also did not encompass the idea that property could be taken through application of regulatory measures enacted by a legislature or implemented by an executive agency. See *Lucas*, 505 U.S. at 1014 (citing *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922)). But extension of the Clause to cover such affirmative measures by the political branches does not counsel further extension to decisions by the courts. Whereas the modern regulatory state is a new creation, calling for new applications of the Clause to govern its functions, the authority of courts to modify common law or interpret statutes remains essentially unchanged from the time of the Founding.

3. In the long history of its jurisprudence under the Just Compensation Clause, this Court has never held that a state court decision has effected a judicial taking. Over one hundred years ago, this Court applied the Just Compensation Clause to the States, noting that the Fourteenth Amendment "extend[s] to all acts of the State, whether through its legislative, its executive, or its judicial authorities." *Chicago, Burlington & Quincy R.R.* v. *City of Chi.*, 166 U.S. 226, 234 (1897) (internal quotation marks omitted). But that case concerned a traditional eminent domain proceeding, *id.* at 230, and the Court had no occasion to consider whether a state court's interpretation of state property law, independent of an action by the government to condemn property, could constitute a taking.

Since that time, the Court has repeatedly recognized that state courts have broad authority over state property law. See, *e.g.*, *Oregon* v. *Corvallis Sand & Gravel*

Co., 429 U.S. 363, 378-379 (1977); *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U.S. 673, 681 n.8 (1930); *Fox River Paper Co.* v. *Railroad Comm'n*, 274 U.S. 651, 657 (1927). And the Court has remarked on several occasions that "[a] person has no property, no vested interest, in any rule of the common law." *Duke Power Co.* v. *Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978) (internal quotation marks omitted). Those statements strongly indicate that a judicial decision cannot itself effect a taking.

Several Members of this Court have suggested that a claim for a judicial taking might be available in certain circumstances. In a concurring opinion in *Hughes* v. *Washington*, 389 U.S. 290 (1967), Justice Stewart suggested that a state supreme court decision that "constitutes a sudden change in state law, unpredictable in terms of the relevant precedents," could constitute a taking. *Id.* at 296. But he explained that such a constitutional restraint would exist only in extraordinary cases, in which a State otherwise could "defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." *Id.* at 296-297. Similarly, in an opinion dissenting from denial of certiorari in *Stevens* v. *City of Cannon Beach*, 510 U.S. 1207 (1994), Justice Scalia, joined by Justice O'Connor, suggested that a state court decision may itself violate the Just Compensation Clause if the decision "invok[ed] nonexistent rules of state substantive law" as a "pretext[]" to deny the existence of a property right and thus to deny compensation to a landowner. *Id.* at 1211. But against the weight of the Clause's text, historical understanding, and this Court's precedents—as well as further considerations discussed

below—the Court should not embrace that theory. Cf. *Lingle*, 544 U.S. at 540-545.[6]

4. Recognizing a judicial takings cause of action under the Constitution would intrude on one of the core functions of the state courts. This Court long has acknowledged the state courts' authority to adapt common law property rules to new and changing circumstances. See, *e.g.*, *Duke Power Co.*, 438 U.S. at 88 n.32; *Corvallis Sand & Gravel Co.*, 429 U.S. at 379. Permitting takings claims based on state court property decisions would have the potential to significantly skew or chill the state courts in their exposition of property law.

Recognition of a judicial takings theory also would work a substantial change in this Court's relationship with the state courts. As a matter of "comity and respect," this Court ordinarily "defer[s] to the decisions of state courts on issues of state law." *Bush* v. *Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring); see, *e.g.*, *San Remo Hotel L.P.* v. *City & County of S.F.*, 545 U.S. 323, 343 n.24 (2005); *Younger* v. *Harris*, 401 U.S. 37, 44 (1971). That is particularly true in the takings context, where the identification of a valid property interest is a necessary condition precedent to any claim under the Just Compensation Clause. See, *e.g.*, *Phillips*, 524 U.S. at 164; *Sauer* v. *City of N.Y.*, 206 U.S. 536, 546 (1907) (state court's determination regarding whether easement existed was "conclusive upon this [C]ourt"). Requiring States to pay compensation based on judicial

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[6] The Court has indicated that a state court's decision determining property rights may in certain extraordinary circumstances implicate the Due Process Clause. See *Demorest* v. *City Bank Farmers Trust Co.*, 321 U.S. 36, 42-43 (1944); *Broad River Power Co.* v. *South Carolina*, 281 U.S. 537, 540-541 (1930). But such a claim would not sound under the Just Compensation Clause. See *Lingle*, 544 U.S. at 543.

interpretations, rather than the actions of their political branches—or holding that a state supreme court has itself violated the Constitution by taking property if no compensation was available—would be a significant federal intrusion on the independent judgment and prerogatives of the state courts.

Recognition of a judicial takings claim also could lead to a variety of practical problems. It would encourage relitigation of unsuccessful conventional takings claims as judicial takings claims, as happened here. And if those claims were first raised before this Court, there would be little record evidence to evaluate whether a taking occurred. See *Stevens*, 510 U.S. at 1213 (Scalia, J., dissenting from denial of certiorari).

Further, if a state court's interpretation of state law affecting property could itself be treated as a taking of that property, the question might arise as to whether a decision of this Court construing federal law could also constitute a taking—*e.g.*, by overruling a prior precedent. But it is not clear how such a constitutional limitation on this Court's interpretation of the law would be administered. No court could sit in direct review of this Court's decision, and a collateral attack seeking compensation for the Court's decision in the Court of Federal Claims under the Tucker Act, 28 U.S.C. 1491, would be exceedingly problematic—even if that Act could be interpreted to make compensation available based on an assessment of the Court's decisions.

5. In short, approval of a judicial takings theory could "throw one of the most difficult and litigated areas of law into confusion, subjecting States * * * to the potential of new and unforeseen claims in vast amounts." *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 542 (1998) (Kennedy, J., concurring in the judgment and dissenting in

part). At the very least, great caution should be exercised before embarking on that course. And surely, the Court should not work this revolutionary change in takings law in a case that, properly understood, does not even present a "judicial takings" issue.

B. This Is Not An Appropriate Case In Which To Recognize A Judicial Takings Claim

This Court should not recognize a "judicial takings" claim in this case because, at bottom, the action complained of was not that of a court. The gravamen of petitioner's claim has always been that the Act, as implemented, effects a taking by eliminating rights to obtain future accretions and maintain contact with the water. That is a conventional takings claim based on legislative and executive action, not a judicial takings claim. After the state supreme court rejected the conventional takings claim, petitioner attempted to transform that claim into one resting on an asserted judicial taking. That effort at repackaging should be rejected.

1. Petitioner's claim is not one for a judicial taking, because the essence of the claim is that the Florida Supreme Court erred in rejecting its conventional takings claim. Petitioner argued to the Florida Supreme Court that application of the Act effects a taking, because the establishment of the ECL and the restoration of beach on the State's land deprived its members of any direct contact with the water and the opportunity for future accretions to their land. Even in this Court, petitioner continues to tie its claim to the Act. See, *e.g.*, Pet. Br. 52 ("[T]he Act, with the blessing of the Florida Supreme Court, effects a physical taking of [petitioner's] members' property."); *id.* at 54 ("[T]he Act (with the Florida Supreme Court's blessing) takes all littoral rights, gives

them to the State, and 'replaces' them with inferior statutory rights without paying compensation.").

If they are to be recognized at all, judicial takings should be limited to situations in which a court's decision directly and of its own force allegedly impairs property rights through a declaration in a freestanding suit, because only in those circumstances is a property owner without other recourse. When non-judicial actors perform the actions that allegedly take property, property owners may seek compensation based on *those* actions, through a conventional takings claim. If the state court rejects the takings claim based on background principles of state common law, the owner may argue to this Court that a taking has occurred, and this Court may review the state court's interpretation and application of state law. See, *e.g.*, *Lucas*, 505 U.S. at 1032 n.18; see also *Bush*, 531 U.S. at 115 n.1 (Rehnquist, C.J., concurring). In those circumstances, the Court discharges its ordinary review function, rather than taking the extraordinary step of holding that the State's highest court has itself acted unconstitutionally, or effectively requiring that a State pay compensation based on a decision of that court.

2. By the very nature of petitioner's judicial takings claim—that the actions of the State's highest court in themselves constitute a taking—no court has ever previously considered the question.[7] *A fortiori*, neither has any court ever considered the issue of compensation for any such taking.

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[7] Although petitioner did raise its judicial takings claim in a petition for rehearing to the Florida Supreme Court, see Pet. App. 144-148, that court's denial of discretionary rehearing does not express a view on the merits of the claim, see, *e.g.*, *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992).

The Court ordinarily does not consider issues that were not pressed or passed upon below. *Adams* v. *Robertson*, 520 U.S. 83, 86 (1997) (per curiam). That rule "serves an important interest of comity," "avoids unnecessary adjudication in this Court," and ensures that the Court "has an adequate legal and factual record" upon which to assess the federal claim. *Id.* at 90-91.

In addition, as the Court frequently has observed, "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194 (1985) (citing cases); see, *e.g.*, *First English Evangelical Lutheran Church* v. *County of L.A.*, 482 U.S. 304, 314-315 (1987). As a result, "no constitutional violation occurs until just compensation has been denied." *Williamson County*, 473 U.S. at 194 n.13. Just as "takings claims against the Federal Government are premature until the property owner has" sought compensation under the Tucker Act, a claim that a State has taken property in violation of the Just Compensation Clause is not ripe "until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State." *Id.* at 195.

Here, the Act itself expressly authorizes a person "substantially affected" by the Act to bring suit in state court to determine whether application of the Act "constitut[es] a taking without just compensation." Fla. Stat. Ann. § 161.212(2). Petitioner brought a lawsuit under that provision, which is still pending but stayed. Petitioner's members therefore had a fully adequate compensation remedy to challenge the application of the Act to them.

Petitioner's members have not separately sought compensation in state court for the alleged judicial taking, and they presumably would confront formidable practical and legal obstacles to prevailing on a claim that the state supreme court's decision constituted such an unwarranted and drastic departure from prior law to amount to a taking. But not all recourse is foreclosed, because the state supreme court specifically limited its ruling to rejection of a challenge to the Act on its face, not as applied to particular parcels.

3. Because petitioner's members did not pursue their takings claims under the state statute enacted for that purpose, the record is inadequate to resolve their claims. For example, the record contains no documentary evidence of the members' ownership of affected properties. Nor is there any evidence about the value of the properties or how the value would be affected by the restoration project. That type of evidence often is critical in takings cases, which normally involve "essentially ad hoc, factual inquiries." *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) (internal quotation marks omitted). This Court should consider the viability of a judicial takings claim only in a case in which the record is sufficient to determine whether a taking actually has occurred. See *Stevens*, 510 U.S. at 1213 (Scalia, J., dissenting from denial of certiorari) (concluding that review of judicial takings claim would be inappropriate because no "record concerning the facts [was] compiled," so that it was "beyond [the Court's] power—unless [it] t[ook] the extraordinary step of appointing a master to conduct factual inquiries—to evaluate petitioner's takings claim").

4. Because petitioner's members had available a fully adequate procedure for presenting a conventional

takings claim, and for the other legal and practical reasons just discussed, the Court should deny their claim that the decision of the Florida Supreme Court itself constitutes a taking of property. In the alternative, the Court may wish to dismiss the writ for want of a properly presented federal question. See, *e.g.*, *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 573-574, 584 (1947).

C. The Decision Below Reasonably Applied Existing Law To New Circumstances And Does Not Result In A Taking

If a judicial takings theory were ever to be accepted, it must be limited to the extraordinary case in which a state court has radically and unexpectedly deviated from settled law. There was no such departure here. The Court therefore should reject the judicial takings claim in this case, and leave for another day the question whether or when such a claim might lie.

1. Members of this Court who have suggested the viability of a judicial takings claim have stressed that one would lie only if the state court's decision marked a startling departure from settled property rights. In *Hughes*, Justice Stewart suggested that if a state court decision "arguably conforms to reasonable expectations, [the Court] must of course accept it as conclusive," but that if "it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate." 389 U.S. at 296 (Stewart, J., concurring). Justice Scalia's formulation in *Stevens* was similar: if "it cannot fairly be said" that the court's decision had support in existing law, "then the decision now before us has effected an uncompensated taking." 510 U.S. at 1212 (Scalia, J., dissenting from denial of certiorari).

As those opinions suggest, any judicial takings claim must be limited to the rare occasion when a state court decision falls well outside the range associated with evolving common law. Put another way, the decision must work a "sudden," "unpredictable," or "unforesee[n]" change in state law (*Hughes*, 389 U.S. at 296-297 (Stewart, J., concurring)), in a manner that lacks "arguabl[e]" (*id.* at 296) or "fair[]" support (*Stevens*, 510 U.S. at 1212 (Scalia, J., dissenting from denial of certiorari)) in existing state law. A judicial takings claim therefore could not lie when a state court considers a matter of first impression, or has spoken to the issue presented only in dicta in prior opinions, or the issue arises in a new context presenting significant countervailing property interests or public interests not previously considered. Regardless of the precise standard utilized, the decision below cannot plausibly qualify as the type of rare and unfounded decision that could effect a judicial taking.

2. As petitioner acknowledges (Pet. Br. 27, 31; Pet. App. 140, 143), the Florida Supreme Court in this case did not overrule or disavow any of its prior precedents. Instead, after reviewing its prior decisions, the court reasonably concluded, in the previously unexamined context of a beach restoration project, that the property rights of upland owners do not include an entitlement to obtain future accretions and maintain contact with the water.

In particular, the court considered the impact of an Act under which the State authorized the restoration of beach through the placement of sand on the State's *own* submerged lands—lands that both the Florida Constitution and this Court's cases recognize as a fundamental aspect of state sovereignty. The court did not alter or

redefine littoral property rights that would exist in the absence of any such action by the State or other changed circumstances, as the Washington Supreme Court did in *Hughes*.

The loss by petitioner's members of direct contact with the water was simply the incidental consequence of the State's exercise of its proprietary and sovereign rights to restore beach on its property. And the Act expressly preserves the common law right of access to the water over the State's land—as well as the right of view, by generally prohibiting construction on newly restored beach. Fla. Stat. Ann. § 161.201. The absence of future accretions (or erosions) to uplands likewise is simply an incidental consequence of the State's using its own lands to restore the beach: with the placement of sand on the State's submerged lands, any future accretions (or erosions) necessarily will be at the seaward edge of the beach on the State's property, and there no longer is any water's edge on the upland property that new land could accrete *to*. Petitioner's takings claim is thus fundamentally a contention that its members' ownership of their parcels gave them an absolute right to prevent the State from placing sand on its adjacent land to restore the beach for the benefit of the public, including petitioner's members. Given the fundamental sovereign interests in submerged lands of this kind, general statements in prior Florida cases concerning the attributes of littoral property should not lightly be read to have foreclosed the State from taking these measures.

Indeed, in *Hughes*, which held that federal law afforded the littoral property owner a right to accretions by natural forces, the Court recognized that "these riparian rights are to some extent insecure * * * since they are subject to considerable control by the neigh-

boring owner of tideland." 389 U.S. at 294. The Court cited a case holding that "the State may fill its tidelands and thus block the riparian owner's natural access to the water." *Id.* at 294 n.3 (citing *Port of Seattle* v. *Oregon & Wash. R.R.*, 255 U.S. 56 (1921)). The Court also cited (*id.* at 294) a case which noted that in New Jersey as elsewhere the common law offered a right of accretion "as against the State as well as its grantees, where as here the grantees have not filled in the land." *Stevens* v. *Arnold*, 262 U.S. 266, 270 (1923). Florida law, of course, need not be the same as that of Washington, New Jersey, or other States. But in fact nothing in Florida law foreclosed the State from taking its balanced approach to beach restoration.

a. Petitioner first contends (Br. 24-27) that the Florida Supreme Court suddenly eliminated its members' rights to maintain contact with the water. The Florida Supreme Court rejected that argument, explaining that, although littoral property owners have a "core littoral right of access to the water," they do not have an independent right to have their property touch the water. Pet. App. 36-37.

That conclusion does not represent any sudden break in the law. The Florida Supreme Court had issued numerous decisions holding that uses of sovereign lands impermissibly deprived the upland owner of access to the water. Pet. App. 36 (citing *Webb* v. *Giddens*, 82 So. 2d 743, 745 (1955); *Thiesen* v. *Gulf, Fla. & Ala. Ry.*, 78 So. 491, 501, 506-507 (1917); *Ferry Pass Inspectors' & Shippers' Ass'n* v. *White's River Inspectors' & Shippers' Ass'n*, 48 So. 643, 646 (1909)). But the court had not addressed whether an upland owner who retains his common-law right of access has an independent right to

direct contact with the water, especially as against the interests of the State asserted here. *Ibid.*

In one prior decision—rendered 17 years after the relevant portion of the Act was passed—the Florida Supreme Court had remarked that littoral property rights include "the right of access to the water, including the right to have the property's contact with the water remain intact." *Board of Trs. of the Internal Improvement Trust Fund* v. *Sand Key Assocs., Ltd.*, 512 So. 2d 934, 936 (1987). But that statement was dictum—the issue before the court was who owned certain lands, not whether there was an independent right to touch the water, *id.* at 934—and (in any event) that dictum did not suggest any right to contact the water independent of the right of access, especially in the quite different circumstances here. Pet. App. 36. Indeed, the Florida Supreme Court long ago held that when dry land is created adjacent to upland property through intervention by the State—by draining a lake—the newly exposed lands belong to the State. See *Martin* v. *Busch*, 112 So. 274, 284-285 (Fla. 1927). The necessary consequence is that the riparian owner loses the ability to touch the water from his own property. Similarly here, because the Beach and Shore Preservation Act rests on the State's exercise of its authority over its adjacent land, and expressly preserves the basic common law right of access, see Fla. Stat. Ann. § 161.201, the court reasonably concluded that the Act did not unconstitutionally deprive petitioner's members of an independent right to touch the water.[8]

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[8] The longstanding common-law doctrine of avulsion also refutes the view that upland owners have an absolute right to maintain contact with the water. Under that doctrine, when there is a sudden and noticeable addition or loss of land, the legal boundary between state-owned tide-

b. Petitioner also contends (Br. 28-31) that the Florida Supreme Court eliminated a recognized "present right to acquire future property" through accretion. The court rejected that argument because "the right to accretion and reliction is a contingent, future interest that only becomes a possessory interest if and when land is added to the upland by accretion or reliction," and because the principles supporting the common-law "rule of convenience" regarding accretions do not apply in the circumstances of a beach restoration project. Pet. App. 20, 34-35.

The Florida Supreme Court's decision did not make any sudden or dramatic change in the law regarding accretions. No prior decision had held that a littoral property owner has a vested right to prevent the filling of adjacent submerged lands owned by the State in order to keep open the possibility of expanding his property through future accretions. The court had held that the legislature could not eliminate a private landowner's title to accretions that had already occurred by retroactively fixing the boundary line between private and state land along the historic meander line of fresh water lakes. See *State* v. *Florida Nat'l Props., Inc.*, 338 So. 2d 13, 16-18 (Fla. 1976). But that decision did not concern a right to future accretions as against actions by the State such as those under the Act in this case. And the

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lands and uplands remains unchanged. See *Bryant* v. *Peppe*, 238 So. 2d 836, 838 (Fla. 1970). Thus, if an avulsion shifts the MHWL seaward, creating new beach in an area that had been submerged, contact between the upland property and the water would be broken because title to the area that had been submerged would remain with the State. See *Sand Key Assocs.*, 512 So. 2d at 940-941.

beach restoration project has no effect on any land that an upland owner previously received by accretion.[9]

Moreover, although the Florida Supreme Court had recognized a common-law "rule of convenience" that an upland owner gains property through accretion or loses it through erosion, Pet. App. 34-35, the court had never held that an upland owner had a vested, absolute right in that "rule of convenience." It therefore was well within the court's discretion to conclude that the rule should not be applied in the new context of a beach restoration project under which the government agrees to create and maintain beach on adjacent state-owned land and the upland owner no longer bears the risk of erosion. See *ibid.*

Indeed, prior to the decision below, Florida law already had recognized that any right to receive future accretions is not absolute. For example, the doctrine of avulsion contains an implicit limitation on the right of accretion by preserving state ownership of suddenly created land. See, *e.g.*, *Bryant* v. *Peppe*, 238 So. 2d 836, 838 (Fla. 1970). And the court had applied that principle in the specific context of a project by the State to lower the level of a lake, recognizing that the State retained title to the previously-submerged lands. See *Busch*, 112 So. at 284-285, 287; *id.* at 288 (Brown, J., concurring). Citing that decision, the *Florida National* court acknowledged that when "land is reclaimed by deliberate drainage," the doctrine of reliction is inapplicable. 338

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[9] Petitioner quotes language (Br. 28-29) from the *Florida National* decision referring to "the right to acquire additional property in the future through the process of accretion and reliction," 338 So. 2d at 17, but that was language used by the trial court and not adopted by the Florida Supreme Court, and in any event did not address the situation here.

So. 2d at 18 (citing *Busch*, 112 So. at 287); cf. *Hughes*, 389 U.S. at 294 & n.3. The Florida Supreme Court simply applied that settled principle in this case to conclude that when the State fills in its submerged lands as a buffer against future beach erosion, the closely related doctrine of accretion is inapplicable.

Accordingly, the decision below is by no means the type of extraordinary departure from settled law that would be a necessary predicate for holding that a decision of a state supreme court constitutes a taking under the Just Compensation Clause.

D. Any Infringement Of Rights To Future Accretions And Direct Contact With The Water Does Not Establish Takings Liability

Even if petitioner were correct that the Florida Supreme Court significantly changed settled law concerning rights to accretions and contact with the water, there is no taking under this Court's precedents.

1. This Court has held that a *per se* taking occurs when the government authorizes a physical occupation of property or actually takes title to the property, see, *e.g.*, *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), or when the government "denies all economically beneficial or productive use of land," *Lucas*, 505 U.S. at 1015. None of those occurred here.

Petitioner complains that respondents trespassed on some members' land when restoring the beach (Br. 12 n.9) and that members of the public will walk on their portion of the beach (*id.* at 21). But a temporary trespass is not a taking, and the Florida Supreme Court did not rule on any claim regarding future physical invasion of property; it only addressed the asserted rights to re-

ceive future accretions and maintain contact with the water. Pet. App. 33-38. Because the state supreme court's decision did not address any physical invasion, it cannot constitute a judicial taking on that theory.[10]

Nor did the state court permit the State to actually take title to any portion of petitioner's members' property. Petitioner expressly abandoned its challenge to the location of the ECL, including the argument that the ECL deviated from the existing boundary between state and private property (the MHWL). See J.A. 53. Accordingly, it must be assumed that the ECL fixed the boundaries of petitioner's members' properties as they existed prior to the beach restoration project, and therefore no title has been taken.

That leaves petitioner with a claim that the Florida Supreme Court effected a *per se* taking by infringing upon rights to obtain future accretions and to maintain contact with the water. Petitioner does not allege that the result is to deny its members all economically viable use of their land. This Court has never recognized a categorical taking based on the elimination of two among the bundle of rights of a littoral owner, and it should not do so here. See, *e.g.*, *Penn Cent. Transp. Co.* v. *New York City*, 438 U.S. 104, 130-131 (1978) (whether taking occurred depends on "the nature of the interference with rights in the parcel as a whole"); *Andrus* v. *Allard*, 444 U.S. 51, 65-66 (1979) ("[W]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because

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[10] Petitioner also complains (Br. 55) about the possibility of commercial vendors on the new beach. Even if such activities were permitted by the Act (but see Fla. Stat. Ann. § 161.201), that would not constitute an invasion of petitioner's members' land, because the State owns the newly created beach.

the aggregate must be viewed in its entirety."). And it would be contrary to the principles of "fairness and justice" that inform the interpretation of the Just Compensation Clause, see *Lingle*, 544 U.S. at 537 (internal quotation marks omitted), to conclude that the State has effected a *per se* taking by carrying out a restoration project on its own land to preserve and protect the upland property.

Moreover, the inability to realize future accretions is not akin to a physical appropriation of existing land. Any future interest a property owner has in accreted land is contingent on the shoreline expanding through accretion, rather than constricting through erosion or being subject to avulsion. And even assuming property owners bordering an ECL have lost pre-existing rights of contact and accretion, the State has not acquired those rights. As the owner of tidelands, the State has always owned the lands under the water. See, *e.g.*, *Kruse* v. *Grokap, Inc.*, 349 So. 2d 788, 789-790 (Fla. Dist. Ct. App. 1977). Any accretion that occurs at the seaward edge of the restoration project will shape the government-owned land that is now above the water, but will not increase the amount of governmental property. There is thus no basis for finding a *per se* taking.

2. Because the loss of an ability to exercise two littoral rights does not fall within the "relatively rare [and] easily identified" category of *per se* takings, this case should be analyzed as a situation where "the interference with property rights 'arises from some public program adjusting the benefits and burdens of economic life to promote the common good.'" *Tahoe-Sierra*, 535 U.S. at 324-325 (quoting *Penn Cent.*, 438 U.S. at 124). For such a situation, this Court undertakes an "ad hoc, factual inquir[y] * * * designed to allow careful exami-

nation and weighing of all the relevant circumstances," *id.* at 322 (internal quotation marks omitted), considering factors such as the "economic effect on the landowner, the extent to which the [government action] interferes with reasonable investment-backed expectations, and the character of the government action," *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 617 (2001).

The question under the Just Compensation Clause is not whether property owners lost two discrete nonpossessory rights, but rather whether "the parcel as a whole" is so burdened that the Just Compensation Clause applies. *Tahoe-Sierra*, 535 U.S. at 327 (internal quotation marks omitted). Because petitioner has proffered no evidence as to the economic impact on the "parcel as a whole" of eliminating the claimed rights to contact and accretion, it has necessarily failed to make out its claim for a judicial taking under the *Penn Central* framework.

3. Finally, no Just Compensation Clause violation occurs, even where governmental action would otherwise constitute a *per se* taking, if the amount of compensation would be zero. See *Brown* v. *Legal Found. of Wash.*, 538 U.S. 216, 240 (2003). The beach restoration project here provides important benefits to upland owners, such as protection from loss of their land through erosion and from damage to their property by storms and hurricanes and resulting surges. Any assessment of compensation must account for those offsetting benefits, which will in fact increase the value of many littoral properties. See *United States* v. *Sponenbarger*, 308 U.S. 256, 266-267 (1939); cf. Fla. Stat. Ann. § 161.212(3)(b). Petitioner has made no attempt to demonstrate that the project would reduce the value of its members' property. For this reason as well, the record

does not support a finding of a judicial taking without just compensation.

CONCLUSION

The judgment of the Florida Supreme Court should be affirmed. In the alternative, the writ should be dismissed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

STOP THE BEACH RENOURISHMENT, INC.,
Petitioner

v.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND, WALTON COUNTY, AND CITY OF DESTIN,
Respondents.

On Writ of Certiorari to the Florida Supreme Court

BRIEF *AMICUS CURIAE* OF AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE[1]

The American Civil Rights Union (ACRU) is a non-partisan legal policy organization dedicated to defending all constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time Reagan policy advisor and architect of modern welfare reform Robert B. Carleson, and since then has filed *amicus curiae* briefs on constitutional law issues in cases all over the country.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General Edwin Meese III; Pepperdine Law School Dean Kenneth W. Starr; former Assistant Attorney General for Civil Rights William Bradford Reynolds; John M. Olin Distinguished Professor of Economics at George Mason University Walter E. Williams; former Harvard University Professor, Dr. James Q. Wilson; Ambassador Curtin Winsor, Jr.; and Dean Emeritus of the UCLA Anderson School of Management J. Clayburn LaForce.

This case is of interest to the ACRU because we want to ensure that all constitutional rights are fully protected, not just those that may advance a particular ideology. That includes the right to

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[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties consented to the filing of this brief and were timely notified.

compensation for the taking of property under the Fifth Amendment.

STATEMENT OF THE CASE

Petitioner is an organization of homeowners whose property lies on the Florida coastline. Pursuant to a supposed "beach nourishment" project authorized by state statute, respondents have redefined the property lines of these homeowners from the Mean High Water Line in front of their homes to a new Erosion Control Line. This redefinition was accomplished by unilaterally recording a beach survey in the official property records of Walton County, without any judicial proceeding.

Prior to that redefinition of their property lines, the properties of these homeowners included an accreting beach in front of their homes with more than 200 feet of dry sand to the Mean High Water Line. J.A. 252, 261.[2] Now after that redefinition and the "beach nourishment," there is an additional 75 foot public beach between their properties and the water. J.A. 261. Their properties consequently no longer go to the water, and they have lost all the littoral rights that pertain to oceanfront properties, as discussed further in the Argument below. Yet no compensation has been paid for this loss of property rights.

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[2] In this brief, citations to the Joint Appendix are denoted by "J.A." Citations to the Appendix to Petitioners Petition for a Writ of Certiorari will be denoted by "Pet. App."

Oceanfront properties have been transformed into ocean view properties, and a private beach has been replaced with a public beach. The homeowners paid considerable sums for oceanfront properties with private beaches, yet they have received nothing for the loss of what they paid for.

Petitioner filed an administrative petition with the Florida Department of Environmental Protection ("DEP") challenging issuance of a Joint Coastal Permit to pursue the beach nourishment project. The DEP rejected that challenge, and Petitioner appealed to the Florida First District Court of Appeal.

That court held unanimously that the redefinition of the property lines of the coastal homeowners from the Mean High Water Line to the Erosion Control Line was an uncompensated taking of property rights of the homeowners, and invalidated the redefinition.

But the Florida Supreme Court reversed, redefining the littoral rights the homeowners enjoyed from their oceanfront property to no longer exist, in the process reversing 100 years of established property law and precedent in Florida. Since the redefined property rights no longer existed, the court held that they were not taken by the "beach nourishment" project. Justice Lewis said in dissent,

> "I cannot join the majority because of the manner in which it has 'butchered' Florida law....[T]he majority's construction of the Beach and Shore Preservation Act is based

> upon infirm, tortured logic and a rescission from existing precedent under a hollow claim that existing law does not apply or is not relevant here. Today, the majority has simply erased well-established Florida law without proper analysis...."

Pet. App. 41-42.

Petitioner filed a motion for rehearing with the Florida Supreme Court, which was denied. The requested Writ of Certiorari was granted on June 15, 2009.

SUMMARY OF ARGUMENT

Before the "beach nourishment" project, the petitioner homeowners enjoyed a private beach in front of their homes and extensive littoral rights resulting from their property lines extending out to the Mean High Water Line. The beach nourishment project, however, unilaterally replaced their property lines at the Mean High Water Line with new property lines at a newly established Erosion Control Line. As a result, a new 75 foot public beach was established in front of each of the homes seaward of the Erosion Control Line, and the homeowners lost all of their attendant littoral rights.

The oceanfront properties of each of the homeowners were consequently transformed into ocean view properties, with the view including the commercial vendors that now have the right to operate on the public beach in front of each of their homes. Through the "beach nourishment" project,

the established littoral property rights of the homeowners have been transferred to the state and local respondents for public use. No compensation has been paid to the homeowners for this loss and transfer of their property rights.

Florida courts have long recognized that the littoral property rights taken from the homeowners were protected by the Takings Clause of the U.S. Constitution. But the Florida Supreme Court below failed to follow these precedents. It made up new law to redefine the littoral property rights of the homeowners out of existence. That way the property rights could not have been taken and the state and local respondents would not have to pay any compensation.

Under long established precedents of this Court, state courts may not evade state responsibilities under the Takings Clause by such redefinition of established property rights. The attempted redefinition of the property rights of the homeowners cannot change what actually happened in this case: the state and local respondents have taken the established littoral property rights of the homeowners for public use.

The beach nourishment project also violated the due process rights of the homeowners. In addition, beach nourishment is not a pro-environment policy. Quite to the contrary, the policy has highly destructive environmental effects, and has been challenged as dumping taxpayer dollars into the ocean.

ARGUMENT

I. Unilaterally Revising Homeowners' Property Lines Involved an Unconstitutional Taking of Private Property Without Compensation.

A. The Beach Nourishment Project Took Private Property Rights of the Homeowners.

Before the "beach nourishment" project, the property line for each of the petitioner homeowners was recognized to be the Mean High Water Line. This provided the homeowners with oceanfront property running all the way to the water, including 200 feet of private, dry sand, beach.

The property line at the Mean High Water Line triggered littoral rights under long established Florida law. These littoral rights included the right to exclusive possession and use of the beach in front of their homes, and to exclude others from that beach. They include as well the exclusive right of access over their own property to the water. Included as well is the right of accretion, or ownership of any expansion of the beach over time. Another littoral right is the right to an unobstructed view of the ocean, without the obstruction of the general public and commercial vendors on a public beach. The homeowners paid substantial sums for this private beach and attendant littoral rights.

After the beach nourishment project, the property line for each of the petitioner homeowners

has been unilaterally changed by the state and local government respondents from the Mean High Water Line to a newly created Erosion Control Line. As a result, the property of each of the homeowners no longer goes to the Mean High Water Line, and the homeowners have lost all of the littoral rights that are contingent on their property extending to that line under Florida law.

The homeowners no longer own oceanfront property, or a private beach that goes to the water. Instead, their property goes only to the Erosion Control Line, after which there is a newly created, 75 foot, public beach that extends to the water. The right of the homeowners to the beach on the other side of the Erosion Control Line has been transferred to the state under the beach nourishment statute, which states, "title to all lands seaward of the erosion control line shall be deemed to be vested in the state by right of its sovereignty." Fla. Stat. Sect. 161.191(1). All of the littoral rights that go with ownership of property to the Mean High Water Line under Florida law have consequently now been transferred to the state as well.

The homeowners no longer enjoy the exclusive right of use of the beach in front of their homes to the water, or the right to exclude others from that beach. Instead the general public now has the right to use the beach on the waterfront. This includes the right of commercial vendors to operate on the public beach in front of the homes of each of the homeowners.

The homeowners also no longer enjoy the exclusive right of access to the water from the beach

in front of each of their homes. Anyone and everyone can now bring boats to the beach in front of each of their homes, and launch the boats in the water in front of their homes. Anyone and everyone can also now dive into the water and swim from the beach in front of each of their homes. The homeowners no longer own any right of access over their own property to the water, because they can no longer even access the water from their own property.

The homeowners also no longer enjoy the right to an unobstructed view of the ocean. Instead, that view is now obstructed by the general public on the public beach now in front of each of their homes, the commercial vendors on that beach, the boats launched by the general public from that beach, and the swimmers diving into the water in front of each of their homes from that beach.

Finally, the homeowners also no longer enjoy the right of accretion of the beach in front of each of their homes. Instead, by operation of the beach nourishment statute, that right has been transferred to the state, which owns the expanded portion of the beach resulting from the "beach nourishment." The statute states, "the common law shall no longer operate to increase or decrease the proportions of any upland property lying landward of such line, either by accretion or erosion or by any other natural or artificial process...." Fla. Stat. Sect. 161.191(2).

Yet, the homeowners have received no compensation for the loss of these property rights to the state.

B. The Uncompensated Taking of the Private Property Rights of the Homeowners Violates the Constitution.

The courts have long recognized what should be obvious. The uncompensated taking of the private property rights of the homeowners as described above violates the Takings Clause of the U.S. Constitution. The Florida Supreme Court recognized this 100 years ago in *Broward v. Mabry*, 50 So. 826, 830 (Fla. 1909), holding that such littoral rights "are property rights that may be regulated by law, but may not be taken without just compensation and due process of law." *Thiesen v. Gulf, Florida & Alabama Railway Co.*, 78 So. 491 (Fla. 1917); *Brickell v. Trammell*. 82 So. 221 (Fla. 1919); *Hayes v. Bowman*, 91 So. 2d 795 (Fla. 1957); *State v. Fla. Nat'l Prop., Inc. (Florida National)*, 338 So. 2d 13 (Fla. 1976); *Belvedere Dev. Corp. v. Dep't of Transp.*, 476 So. 2d 649 (Fla. 1985); *Board of Trustees v. Sand Key Assocs., Ltd.*, 512 So. 2d 934 (Fla. 1987).

In *Florida National*, a state statute replaced the property owner's property line at the Ordinary High Water Line with a different boundary between the property owner's upland and the state owned sovereign submerged lands. The court held the statute unconstitutional because changing the property line from the Ordinary High Water Line extinguished the property owner's riparian right to accretion without just compensation. The court said,

> "By requiring the establishment of a fixed boundary line between sovereignty bottom lands and Plaintiff's riparian lands, Fla. Stat.

> s 253.151...constitutes a taking of Plaintiff's property, including it's riparian rights to future alluvion or accretion, without compensation in violation to the due process clause of the Fourteenth Amendment of the United States Constitution and the due process clause of...the Florida Constitution.

338 So. 2d at 17.

This Court reached the same conclusion regarding riparian property rights 135 years ago in *County of St. Clair v. Lovington*, 90 U.S. 46, 68-69 (1874), saying,

> "The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property. The title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds, to their natural increase. The right is a natural, not a civil one."

But the Florida Supreme Court below failed to follow these precedents. It made up new law to redefine the littoral property rights of the homeowners out of existence. That way the property rights could not have been taken and the state and local respondents would not have to pay any compensation.

In regard to the littoral right to accretion, the Florida Supreme Court below held uniquely in a trailblazing ruling that such a right was only "a

contingent future interest," not a presently vested right. In particular, this innovation directly contradicted its own holding in *Florida National*, where the court said,

> "the State...claims not only the lands to which Plaintiff has already gained title through the operation of accretion and reliction, but also seeks to deny to Plaintiff the right to acquire additional property in the future through the process of accretion and reliction."

330 So. 2d at 17. The court consequently recognized, unlike the Florida Supreme Court below, that the right to accretion is a present, vested, property right to future gains, like the future fruit from a tree, or the future gains from a flock or a herd. This was one of the property rights taken without compensation from the homeowners in the present case.

But as Justice Stewart said in *Hughes v. Washington*, 389 U.S. 290, 298 (1967), the "Constitution measures a taking of property not by what a state says,...but by what it does." And what the state has done in this case is take all of the littoral property rights of the homeowners discussed above in Part I.A. As Justice Lewis said in dissent below,

> "By essential, inherent definition, riparian and littoral property is that which is contiguous to, abuts, borders, adjoins, or touches water. In this State, the legal essence of littoral or riparian land is contact with the water. Thus, the majority is entirely incorrect when it

> states that such contact has no protection under Florida law and is merely some 'ancillary' concept that is subsumed by the right of access. In other words, the land must touch the water as a condition precedent to all other riparian or littoral rights and, in the case of littoral property, this touching must occur at the [Mean High Water Line].

Pet. App. 43-44 (footnotes and citations omitted). Once the homeowners' property lines were separated from the Mean High Water Line, all the littoral property rights discussed above in Part I.A. were lost, or more precisely, taken by the state and local respondents.

State courts, of course, cannot be allowed to avoid the state's responsibility to pay compensation for taken property rights under the federal Takings Clause by redefining the taken property rights out of existence, as the Florida Supreme Court has tried to do below. As Justice Stewart explained in *Hughes*, while a state, "is free to make changes, either legislative or judicial, in its general rules of real property law, including the rules governing the property rights of riparian owners," the state still must pay compensation for any property taken. 389 U.S. at 295. Justice Stewart continued saying most importantly,

> "a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all."

Id. at 296-97.

Just as in the present case, a taking of private property rights by the redefinition of those rights is exactly what happened in *Hughes*, as Justice Stewart also explained,

> "There can be little doubt about the impact of that change [property rights redefinition] upon Mrs. Hughes: The beach she had every reason to regard as hers was declared by the state court to be in the public domain. Of course the court did not conceive of this action as a taking....But the Constitution measures a taking of property not by what a state says, or by what it intends, but by what it does. Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property – without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment."

Id. at 297-298.

This Court recognized a similar situation in *Chicago Burlington & Quincy Railroad Co. v. Chicago*, 166 U.S. 226 (1897). In holding that the

Takings Clause of the Fifth Amendment applies to the states through the Fourteenth Amendment, the Court said,

> "In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment of the constitution of the United States, and the affirmance of such judgment by the high court of the state is a denial by that state of a right secured to the owner by that instrument."

166 U.S. at 241. These words apply exactly to what the Florida Supreme Court has done below.

The Court reached the same result in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 679-80 (1930), saying,

> "If the result above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious. The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid state statute. The federal guaranty of due process extends to state action through its judicial as well as through its legislative,

> executive, or administrative branch of government."

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), this Court recognized a taking based on a state's redefinition of property rights similar to what the Florida Supreme Court did below. A state statute authorized the physical occupation of a portion of apartment buildings by cable TV companies for cable installation. The state argued that it had merely redefined the property rights of building owners to provide for space for cable TV companies for their cable installations. This Court held the state statute to nevertheless be an unconstitutional taking of private property rights without compensation.

A similar redefinition of property rights was found in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). A Florida statute there declared that the interest on interpleader funds deposited with the court clerk was income of the clerk. The Florida Supreme Court held that this was not a taking because the deposited money was "public" not "private" money. But this Court reversed, saying,

> "Neither the Florida Legislature by statute, not the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as "public money" because it is held temporarily by the court....To put it another way: a State, by *ipse dixit*, may not transform private property into public property without compensation, even

> for the limited duration of the deposit in court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of government power."

449 U.S. at 164.

Similarly, in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), this Court rejected the argument that property rights are created by the state, and the state, therefore, can reshape and redefine those rights with no takings claim because subsequent owners acquire the property with the lesser defined rights, and so have no reasonable investment backed expectation in broader rights. The Court said, in an opinion by Justice Kennedy, that the "State may not put so potent a Hobbesian stick into the Lockean bundle" because it "would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation." *Id.* at 627. In the present case, the homeowners have also been stripped of the ability to transfer their littoral property rights which they owned prior to the "beach nourishment" regulation and redefinition of their property rights.

Justice Scalia has also raised the alarm over takings by state redefinitions of property rights, particularly through judicial redefinitions, writing,

> "Just as a State may not deny rights protected under the Federal Constitution through

> pretextual procedural rulings, neither may it do so by invoking nonexistent rules of state substantive law. Our opinion in *Lucas*, for example, would be a nullity if anything that a state court chooses to denominate 'background law' – regardless of whether it really is such – could eliminate property rights....Since opening private property to public use constitutes a taking , if it cannot fairly be said that an Oregon doctrine of custom deprived Cannon Beach property owners of their right to exclude others from the dry sand, then the decision now before us has effected an uncompensated taking."

Stevens v. City of Cannon Beach, 510 U.S. 1207 (1994)(Scalia, J. and O'Connor,J. dissenting from the denial of a petition for writ of certiorari). In the present case, "invoking non-existent rules of state substantive law" to redefine away the littoral property rights of the homeowners is exactly what the Florida Supreme Court did.

See also Kaiser Aetna v. U.S., 444 U.S. 164 (1979)(This Court found a physical taking where the government mandated a public right of access to a private pond); *U.S. v. Causby*, 328 U.S. 256 (1946)(This Court found a physical taking where government planes used private airspace to approach a government airport); *Ex Parte v. Virginia*, 100 U.S. 339, 346-47 (1879)(In a case involving the actions of a state judge, this Court held, "A State acts by its legislative, its executive, or its judicial authorities....Whoever, by virtue of public position under a State government, deprives another of

property, life, or liberty, without due process of law,...violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State.")(emphasis added); *Scott v. McNeal,* 154 U.S. 34, 45 (1894)(This Court held that the 14th Amendment's due process of law "prohibitions extend to all acts of the state, whether through its legislative, its executive, or its judicial authorities."); *Neal v. Delaware,* 103 U.S. 370 (1880); Thompson, *Judicial Takings,* 76 Va. L. Rev. 1449 (1990); Zywicki, *The Rule of Law, Freedom, and Prosperity,* 10 Sup. Ct. Econ. Rev. 1, 22 (2003)("The documented effect of increasing rule of law values on economic growth is robust. Individuals are more willing to invest...where property rights are stable...."); *E. Enters. v. Apfel,* 524 U.S. 498, 594 (1998)(Kennedy, J. concurring)(drastic retroactive change in the law "can destroy the reasonable certainty and security which are the very objects of property ownership."); *Colo. v. N.M.,* 467 U.S. 310 (1984).

For these reasons, this Court should reverse the Florida Supreme Court below, and hold, as Justice Stewart stated in *Hughes*, that

> "A judicial taking may occur when a court, through sudden departure from established legal principles, has essentially changed long-standing property rights via judicial fiat so as to effect the 'retroactive transformation of private into public property.'"

389 U.S. at 296.

C. The Beach Nourishment Project Violated the Due Process Rights of the Homeowners.

Besides the Takings Clause violation discussed above, the "beach nourishment" project also violated the due process rights of the homeowners under the Fifth and Fourteenth Amendments.

The littoral property rights of the homeowners, and the boundary lines of their propreties, are unquestionably protected by due process. *Board of Regents v. Roth,* 408 U.S. 564 (1972). Due process requires a meaningful opportunity to be heard before deprivation of a property interest. *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Fuentes v. Shevin,* 407 U.S. 67 (1972). As this Court said in *Fuentes*,

> "The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of possessions....[T]he prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference."

407 U.S. at 80-81.

But the only process that the homeowners received in this case was notice of the planned survey and a public meeting before the Board of Trustees of the Internal Improvement Trust Fund to receive the views of the general public. Fla. Stat. Sect. 161.161(4). The Board then must later approve the conducted survey and the new Erosion Control Line, which would then be the new property line of the homeowners. Fla. Stat. Sect. 161.161(5). After approval, the survey specifying the Erosion Control Line is then recorded in the official property records of the appropriate county, which changes the property lines of all the homeowners.

In practice, the Board of Trustees does not even attend the public hearings, nor even review the survey. The Board just delegates all of these duties to an employee of the Florida Department of Environmental Protection, and then just rubber stamps his conclusions. J.A. 49, 87-90.

There is no judicial proceeding, no decision by a neutral, independent judge as to changes in the homeowners' property rights, no opportunity to cross-examine anyone involved in the process. Yet, the property rights of the homeowners are extensively changed as described in Part I.A. above, and their deeds effectively modified.

This is inadequate process for the property interests of the homeowners in the present case, and the transformation of those property interests involved. *Fuentes; Davidson v. New Orleans,* 96 U.S. 97 (1877); *Wilkinson v. Leland,* 27 U.S. 627 (1829); *Ochoa v. Hernandez y Morales,* 230 U.S. 139 (1913);

Goldberg v. Kelly, 397 U.S. 254 (1970). The transformation of these interests at issue here requires a judicial proceeding with full civil procedural rules and decision by a neutral, independent judge.

II. Beach Nourishment Is Not a Pro-Environment Policy; Rather, It Has Been Challenged as Dumping Taxpayer Dollars Into the Ocean.

The term "beach nourishment" sounds like a pro-environment policy to preserve beaches. Nothing could be further from the truth.

A recent report from the Senate Oversight and Investigations Committee explains,

> "The process of beach nourishment involves pumping sediment (often consisting of sand, mud, rocks and shell fragments) collected offshore onto beaches, where it is bulldozed. This is an unnatural process that disrupts local ecosystems both off- and onshore."[3]

The report further noted,

> "Politics, not science, tends to govern decisions about beach nourishment. Scientists have long noted that beach nourishment does not prevent beach erosion, but in fact may exacerbate it. In their analysis of the cost of

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[3] "Washed Out to Sea: How Congress Prioritizes Beach Pork Over National Needs," Congressional Oversight & Investigation Report. United States Senate, 111th Congress, May, 2009, p. 6.

> beach nourishment projects, coastal experts Orrin Pilkey and Andy Coburn write, 'Almost without exception, nourished beaches disappear faster than natural beaches (2 to 12 times faster by our estimate)... [and nourished] beaches recover poorly after storms compared to natural beaches.[4]

A typical example is the beach nourishment project in early 2007 for Long Beach Island in New Jersey. Within a year, the added sediment seemed mostly washed away, and the town's mayor said of his local coastline, "It's right back to where we started."[5]

Localities that are committed to the beach nourishment strategy find that they have to do it over and over to maintain any gains, because the added sand quickly washes out to sea. The Senate report provided these examples,

> "The beach at Cape May, New Jersey, was renourished 10 times between between 1962 and 1995, at a total cost of $24.7 million. Another beach at Ocean City, New Jersey, was renourished 22 times between 1952 and 1995 at a total cost of more than $83.1 million."[6]

The National Oceanic and Atmospheric Administration (NOAA) refuses to fund beach nourishment projects because,

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[4] Id.
[5] Id.
[6] Id.

> "Sand placed on beaches often disappears rapidly because it does not prevent erosion and remains vulnerable to loss from [storm] events. As a result it usually involves a substantial long term investment rather than a one-time payment because of the need to continually renourish the beach."[7]

As a result, "Coastal geologists put the 10-year cost of maintaining nourished beaches along the developed shorelines of New Jersey, North Carolina, South Carolina, and Florida...at $5.9 million per mile."[8]

NOAA also notes this problem, "Beach nourishment also has the unintended effect of spurring new development as it tends to create the perception that an area is now safe for building, putting life and property at unnecessary risk."[9]

Federal funding for beach nourishment primarily comes from the U.S. Army Corp of Engineers. The Senate report states that, "Congress has literally dumped nearly $3 billion into beach projects that have washed out to sea."[10]

A report from the *St. Petersburg Times* explains how this money has been allocated,

> "Congress picks the beaches based on politics and lobbying rather than environmental

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[7] Id., p. 13.
[8] Id.
[9] Id., p.15.
[10] Id., p. 1.

> science...If you read the rules, you might think beaches are picked for federal sand based on a complicated formula about storm damage and flooding. But it's mostly politics, with a little science thrown in for good measure. [Harry] deButts, the head of public works for Avalon, [New Jersey,] calls it 'the game.' Although the Corps of Engineers analyzes each project, Congress decides which projects get built. What matters is raw political clout and whether a law maker has the chops to insert a local project in a bill. DeButts says there is a little science involved, but the real way to get money is to 'duke it out in D.C.'"[11]

The Senate report cites a Heritage Foundation study concluding that beach nourishment is trickle-up economic policy, transferring the tax dollars of ordinary Americans to protect the vacation homes and seasonal businesses of the well-to-do.[12] The Senate report offers this example,

> "As of 2004, beach nourishment along the coast of Long Beach, New York, had already cost federal taxpayers $24 million in studies, and was projected to cost $800 million in total. The project primarily benefited multi-million dollar homes located on the barrier island's primary dunes. Many of these homes had already been flooded or damaged repeatedly by storms, yet were always rebuilt, often tapping federally subsidized flood insurance.

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[11] Id., p. 20.
[12] Id., p. 23.

> Each of these rebuilt Westhampton beachfront homes exceeded exceeded $3 million in value."[13]

As to the environmental impacts, the NOAA states,

> "Beach nourishment projects can have serious long and short-term environmental effects...: disturbance of species feeding patterns; disturbance of species nesting and breeding habits; elevated turbidity levels...; changes in near shore bathymetry [...ocean depth] and associated changes in wave action; burial of intertidal and bottom plants and animals and their habitats in the surf zone; and, increased sedimentation in areas seaward of the surf zone as the fill material redistributes to a more stable profile (National Research Council, 1995). Of particular concern are the impacts to endangered species such as sea turtles and shorebirds which use the beach as nesting areas."[14]

The Senate report also quotes the National Wildlife Federation on some of the environmental impacts of beach nourishment,

> "Processes like beach nourishment gravely affect the sea turtle nesting site. Compact sands and steeper dunes are not conducive to nesting females, as it is more difficult to climb

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[13] Id., p. 24.
[14] Id., p. 26.

> and break apart those sands to create safe nests for laying eggs. Construction that brings intense lights and noise also adversely affect hatchlings that are already vulnerable to predators and degraded environments.[15]

The National Wildlife Federation also joins with Taxpayers for Common Sense to report,

> "[T]here is nothing nourishing about dredging machines mining sand offshore and blasting on the beach through a pipe, and then smoothing the sand with bulldozers. This process can harm shallowwater reefs and habitat essential for fish and other species. In Florida, a handful of projects could bury more than 100 acres of near shore reefs used by more than 500 marine species. The process smothers crabs, mollusks, and shrimp, which are an essential source of food for birds and other marine species. It also buries fragile nesting habitats for sea turtles. Increasingly, these separately considered projects are pieced together to encompass entire coastlines."[16]

As quoted in the Senate report, the coastal environmental experts Pilkey and Coburn ask, "Does anybody truly believe that you can pump millions of cubic yards of sand on a beach, bulldoze it around and do it again every few years...and not have a severe environmental impact?"[17]

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[15] Id., p. 27.
[16] Id., p. 28.
[17] Id., p. 29.

CONCLUSION

For all of the foregoing reasons, the decision of the Florida Supreme Court below should be reversed, and the taken property rights of the homeowners restored.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 08-1151

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In The
Supreme Court of the United States

STOP THE BEACH RENOURISHMENT, INC.,

Petitioner,

v.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND, WALTON COUNTY, and CITY OF DESTIN,

Respondents.

On Writ Of Certiorari To The Florida Supreme Court

BRIEF *AMICUS CURIAE* OF THE AMERICAN PLANNING ASSOCIATION AND THE FLORIDA CHAPTER OF THE AMERICAN PLANNING ASSOCIATION IN SUPPORT OF RESPONDENTS

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The American Planning Association and the Florida Chapter of the American Planning Association respectfully submit this brief *amicus curiae* in support of respondents.[1]

STATEMENT OF INTEREST

The American Planning Association ("APA") is a nonprofit public interest and research organization founded in 1978 to advance the art and science of planning – including physical, economic and community planning – at the local, regional, state, and national levels. The APA's mission is to encourage planning that contributes to the public well-being by developing communities and environments that more effectively meet the present and future needs of people and society. The APA has 47 regional chapters, including the Florida Chapter, and 20 divisions devoted to specialized planning interests. The APA values the diversity of state property laws within our nation because it provides citizens with choices about the types of communities in which to live and work and permits valuable social experimentation.

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amici*, make a monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of all the parties.

SUMMARY OF ARGUMENT

Petitioner and its *amici* urge the Court to embrace the novel idea that a state court ruling on an issue of state common law can constitute a compensable taking under the Fifth Amendment to the U.S. Constitution. The Court has never in its long history recognized a judicial takings claim and it should not do so in this case.

It is well established that, if a state court ruling on an issue of state law is a pretext designed to evade or subvert a federal constitutional right, the Court, pursuant to the Supremacy Clause, can set aside the state court ruling on the ground that it lacks a fair or substantial basis and proceed to vindicate the federal right. The argument that a state court ruling lacks a fair or substantial basis is available to a property owner who contends that a ruling on an issue of state property law has improperly precluded consideration of a federal taking claim based on some legislative or executive branch action. This well established and highly deferential legal standard recognizes that the state courts are solely responsible for defining the state common law of property, but creates a mechanism to ensure that illegitimate state law-making cannot subvert federal constitutional rights.

Petitioner and its allies are now asking the Court to expand enormously the power of the federal courts to supervise state court state law-making and, in effect, to substitute a federal rule of property for the distinct property rules of the individual states. The

judicial takings proposal is inconsistent with the Court's established understanding that the term "property" in the Takings Clause is generally defined by reference to state law, and that the state courts, not the federal courts, are the final expositors of the meaning of state law. It is also inconsistent with the language and original understanding of the Takings Clause. More generally, the judicial takings concept conflicts with our system of federalism, and in particular the principle, epitomized by *Erie v. Thompkins*, 304 U.S. 64 (1938), that the federal courts lack the power to exercise a general supervisory authority over the content of state common law. Finally, the judicial takings theory is inconsistent with the tradition of "cooperative judicial federalism" that has long governed the relationship between the federal and state court systems.

ARGUMENT

I. THE COURT SHOULD REJECT THE NOVEL THEORY THAT A JUDICIAL RULING ON A QUESTION OF STATE PROPERTY LAW CAN CONSTITUTE A COMPENSABLE TAKING UNDER THE FIFTH AMENDMENT.

The Court should reject the proposal by petitioner and its *amici* that the Court adopt the novel theory that a state court ruling on an issue of the state common law of property can constitute a compensable taking under the Fifth Amendment. The

Court rejected this theory over a hundred years ago and no subsequent decision of the Court supports the theory now. Furthermore, as a matter of first principles, the judicial takings theory is inconsistent with both the limitation on the jurisdiction of this Court to matters of federal law and a proper reading of the Takings Clause.

The Definition of "Property" Under the Takings Clause. The so-called judicial takings theory should be rejected because it is well established that the "term" property in the Takings Clause is not defined by the Constitution but instead is defined by reference to some independent source of law, usually state law. When, as in this case, the nature and scope of the property at issue has been defined by a state court under state common law, the state court ruling on the issue represents the final word and this Court has no power to directly review the state court's ruling, whether under a judicial takings theory or on any other basis.

Under the Supremacy Clause, the provisions of the Constitution, as well other federal laws, "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding." U.S. Const. art VI, ¶ 2. Equally important, however, under our federal system, consistent with the Tenth Amendment, the state courts, as arms of independent sovereigns, have the final word on the meaning of state law. "A State's highest court is unquestionably 'the ultimate expositor of

state law,'" and "the prerogative of [a state court] to say what [state] law is merits respect in federal forums." *Riley v. Kennedy*, 128 S.Ct. 1970, 1985 (2008), quoting *Mullany v. Wilbur*, 421 U.S. 684, 691 (1975).

Consistent with this understanding, the Court has long disclaimed jurisdiction to review state court decisions on state law issues. *See Murdock v. City of Memphis*, 87 U.S. 590 (1875). Furthermore, the Court has ruled that it will not review a state court decision, even when it addresses federal law issues, when a state law ground discussed by the state court provides an "adequate and independent" basis for the decision. In perhaps its most emphatic articulation of this rule, the Court stated:

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.

Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945).

Under these principles, a state court ruling in a case involving a federal taking claim that the claim fails at the threshold because the claimant has no

basis for claiming a protected property interest under state law presents no question to this Court about whether the state court ruled correctly. *See* 28 U.S.C. §1257 (limiting the Court's jurisdiction to issues arising under the federal Constitution, statutes, or treaties). The text of the Takings Clause ("nor shall private property be taken for public use, without just compensation") distinguishes the question of what is "property" from the question of what is a "taking" of property. While the meaning of the term "taking" unquestionably involves an issue of federal law, the term "property" is *not* defined by the Constitution; instead, the Court has "resort[ed] to 'existing rules or understandings that stem from an independent source such as state law' to define the range of interests that qualify as 'property' under the Fifth Amendment." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992), quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *see also Phillips v. Washington Legal Found.*, 524 U.S. 156, 164 (1998) ("the Constitution protects rather than creates property interests"). Because the Takings Clause points to state law to define property, and because state courts are the final expositors of the meaning of state law, there is no basis for seeking review under the Takings Clause of a state court ruling on the nature and scope of a state property interest.

The Court unambiguously embraced this position over a hundred years ago in *Sauer v. City of New York*, 206 U.S. 536 (1907). The case involved a

Manhattan property owner claiming that the city's construction of an elevated viaduct above the street abutting his property resulted in a taking of an easement of access, light and air. The Court said that the "only question" it had to decide was "whether the property which the plaintiff alleged was taken existed at all." *Id.* at 547. The New York Court of Appeals had concluded that "the plaintiff had no such easements," *id.*, and this Court, on that basis alone, rejected the federal taking claim. The Court's reasoning is worth quoting at length:

> Surely such questions [of state law] must be for final determination of the state court. It has authority to declare that the abutting landowner has no easement of any kind over the abutting street; it may determine that he has a limited easement; or it may determine that he has an absolute and unqualified easement. . . . [T]his court has neither the right nor the duty . . . to reduce the law of the various states to a uniform rule which it shall announce and impose. Upon the ground, then, that under the law of New York, as determined by its highest court, the plaintiff never owned the easements which he claimed, and that therefore there was no property taken, we hold that no violation of the 14th amendment is shown.

Id. at 549. Remarkably, despite the obvious relevance of this decision to this case, and the clarity of its reasoning, neither the petitioner nor any of its *amici* even cite *Sauer*.

The ruling and opinion in *Sauer* effectively resolved a debate that had split the Court two years earlier in the case of *Muhlker v. New York & Harlem R.R. Co.*, 197 U.S. 544 (1905). That case involved a very similar dispute over whether government-authorized construction of an elevated railway track above a public street resulted in a taking of abutting owners' easements of light and air. The Court overturned the New York court's rejection of the taking claim (and contract claim), with a four-justice plurality opinion and a fifth justice joining in the result. Justice Holmes and three other justices dissented. The plurality opinion arguably adopted the position that the state court ruling that the plaintiffs lacked the state property interest they claimed was subject to challenge as a taking. Justice Holmes, in characteristically pithy yet eloquent language, rejected this theory. Because Justice Holmes's dissenting views in *Muhlker* clearly carried the day in the subsequent *Sauer* case, his reasoning in *Muhlker* is also worth quoting at length.

Justice Holmes began with the following observation: "If at the outset the New York courts had decided that, apart from statute or express grant, the abutters on a street had only the rights of the public and no private easement of any kind it would have been in no way amazing." *Muhlker*, 197 U.S. at 572-73. After discussing decisions from other jurisdictions that had denied the existence of easements in these circumstances, he continued:

> If the decisions, which I say conceivably might have been made, had been made as to the common law, they would have infringed no rights under the Constitution of the United States. So much, I presume, would be admitted by everyone. But if that be admitted, I ask myself what has happened to cut down the power of the same courts as against the same constitution at the present day.

Id. at 573. Holmes then discussed the argument that an earlier decision of the New York Court of Appeals recognized the existence of an easement in these circumstances, and that the New York court's ruling in this case overturned that earlier precedent. In response, Justice Holmes rejected the idea that such a change in state law could support a taking claim: "I know of no constitutional principle to prevent the complete reversal of [the earlier precedent] tomorrow if it should seem proper to" the New York court. *Id.* at 574. In addition, he observed that plaintiff's argument (like petitioner's argument in this case) did not actually challenge the power of the state court to overturn earlier precedent, but its authority to interpret earlier precedent. Thus, in Holmes's view, the plaintiff had to "go much further" in order to prevail, and had to argue "not only that the state courts shall not reverse their earlier decisions upon a matter of property rights, but that they shall not distinguish them unless the distinction is so fortunate as to strike a majority of this court as sound." *Id.*

Justice Holmes rejected this approach. Contrasting his position with that of the plurality, Justice Holmes said he thought the distinctions drawn by the New York court were "not wanting in good sense." But he continued:

> I am not discussing the question of whether they are sound. If my disagreement was confined to that I should be silent. I am considering what there is in the Constitution of the United States forbidding the court of appeals to hold them sound. I think there is nothing; and there being nothing, and the New York decisions obviously not having been given its form for the purpose of evasion, I think we should respect and affirm it, if we do not dismiss the case.

Id. at 575. Finally, he stated:

> I cannot believe that whenever the 14th Amendment . . . is set up, we are free to go behind the local decisions on a matter of land law, and . . . declare rights to exist which we should think ought to be implied from a dedication or location if we were the local courts. I cannot believe that we are at liberty to create rights over the streets of Massachusetts, for instance, that never have been recognized there. If we properly may do so, then I am wrong in my assumption that, if the New York courts originally had declared that the laying out of a public way conferred no private rights, we should have nothing to say. But if I am right, if we are bound by local decisions as to local rights in real

> estate, then we are equally bound by the distinctions and the limitations of those rights declared by the local courts.

Id. at 576. As is apparent from the reasoning in the subsequent *Sauer* decision, these views, initially expressed in dissent, became the Court majority position two years later.

The Court has cited the *Sauer* decision with approval in subsequent cases, *see, e.g., Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42 n.5 (1944); *Fox River Paper Co. v. Railroad Comm'n*, 274 U.S. 651, 655 (1927), and we know of no reason to question the validity of the decision. *See also Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 681 n.8 (1930). Petitioner acknowledges (without discussing Justice Holmes's opinion in *Muhlker* or the Court's subsequent decision in *Sauer*) that Holmes's views contradict its judicial takings theory. (Pet. Br. at 38). But petitioner's answer is simply to cite Justice Holmes's subsequent opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), suggesting that his (and the Court's) recognition of the concept of a regulatory taking meant that all of Holmes's (and the Court's) previous insistence on the autonomy of the state common law of property implicitly fell by the wayside. A brief review of *Mahon* shows the fallacy of this argument, for in that case the Court said there was no dispute that the defendant possessed a property interest under Pennsylvania law; the only question was whether Pennsylvania mining legislation "took" the property.

The Text, Original Understanding and Purpose of the Takings Clause. Apart from the fact that the Takings Clause makes the definition of "property" an issue of state law, and this Court has no jurisdiction to review state court rulings on issues of state law, neither the text of the Takings Clause considered as a whole, nor the clause's original understanding, nor the purpose of the clause supports the judicial takings theory.

As discussed, the language of the Takings Clause makes a distinction between "property" and "taking," thereby establishing a two-step inquiry, focusing first on the property issue and then on the taking issue. In other words, the takings question *presupposes* the existence of a property interest. Given this language, it would be, at best, awkward to read the Takings Clause as supporting the idea that a state court's resolution of the threshold question of whether a property interest exists can itself constitute a "taking" under the Fifth Amendment.

The judicial takings theory is impossible to square with the evidence regarding the original understanding of the Takings Clause. Adoption of the Takings Clause generated essentially no debate during the deliberations over the Bill of Rights, suggesting that this provision was not intended to break new ground. *See* William M. Treanor, *The Original Understanding of the Takings Clause*, 95 Colum. L. Rev. 782, 791 (1995). Contemporary evidence indicates that the drafters' primary goal was to codify the general (but by no means universal)

practice of government payments for establishing roads through private lands, and to address public concerns during the Revolutionary War about military seizures of livestock and other personal property. *Id.* It is generally accepted that the drafters did not intend that police power regulations, which were hardly unknown during the colonial period, would be regarded as potential takings. *See* John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine,* 109 Harv. L. Rev. 1252 (1996); *see also Lucas v. South Carolina Coastal Council*, 505 U.S. at 1028 n.15 ("early constitutional theorists did not believe the Takings Clause embraced regulations of property at all").

So far as we know, there is no evidence that the drafters contemplated that judicial common law rulings could constitute takings. The thought would almost certainly have been perceived as incredible in view of the traditional understanding that common law law-making involves an effort to find, not make, the law. *See* 1 Blackstone, *Commentaries on the Laws of England* 135 (1765). Tellingly, while petitioner's *amici* present detailed accounts of the historical background of the Takings Clause, none offers a wisp of actual evidence that the drafters believed the Takings Clause would apply to state court rulings on common law property questions. In sum, the proposal that the Court adopt the theory of judicial takings represents an invitation to embrace novel doctrine that has no foundation in "the historical compact

recorded in the Takings Clause." *Lucas*, 505 U.S. at 1028.

Finally, the judicial takings theory, at least as articulated by petitioner and its allies, is inconsistent with the basic purpose and scope of the Takings Clause. Petitioner contends, in effect, that the ruling of the Florida Supreme Court should be held to be a taking because it represents a bad faith application of state law designed to defeat federal constitutional rights. (Pet. Br. at 16, 22, 23 (referring to the decision as "result driven," "an attempt to camouflage," and an exercise in "judicial reengineering")). But a proper taking claim presumes that the government has acted for a "public use," that is, a valid public purpose. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005). As the Court explained:

> [T]he Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. The Clause expressly requires compensation where government takes private property '*for public use*.' It does not bar government from interfering with property rights, but rather requires compensation 'in the event of *otherwise proper interference* amounting to a taking.'

Id. at 543, quoting *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (emphases in original). Petitioner's proposed judicial taking claim does not logically fit within takings doctrine because petitioner is contending that the Florida court acted for an

illegitimate purpose, that is, *not* for a "public use." As discussed in Section II, *infra*, such a challenge to state court law-making might support some argument under the U.S. Constitution, but it cannot conceivably support a claim of a taking for a public use.

Federalism Concerns. The judicial takings theory also involves an impermissible intrusion into the state law-making process that is inconsistent with our system of federalism. The theory that a state court's refusal to recognize an asserted right as an entitlement under state law could itself constitute a taking implies that this Court can define, as a matter of federal constitutional law, the permissible dimensions of state real property law. But, as discussed above, the Court has repeatedly recognized that state law defines property interests within the meaning of the Takings Clause, and the Court has long said that it has "neither the right nor the duty" to substitute its understanding of property for that of the state. *Sauer*, 206 U.S. at 549. To be sure, the Court has ruled that certain kinds of government actions are and are not within the scope of the Takings Clause. *See Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) (impositions of financial liability unrelated to any impact on a tangible property interest are outside the scope of the Takings Clause). The Court also has ruled, as a matter of federal law, that a claimant's property interests must generally be viewed in the aggregate to assess whether the burden of a government action on private property rises to the level of a taking.

See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302, 331-32 (2002). In addition, the Court has defined, under federal law, whether government actions should be characterized as restrictions on property use (triggering deferential review), or whether they should be regarded (more rarely) as permanent physical occupations of property interests (triggering more demanding review). *Compare Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978) with *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). But the Court has never suggested that the Takings Clause, of its own force, compels the states to recognize property interests that the state courts have not already identified under state law.[2]

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[2] In the due process context, the Court has stated that whether an interest in receiving a discretionary government benefit qualifies as property within the meaning of the Due Process Clause turns in part on whether the plaintiff has a "legitimate claim of entitlement," an issue governed by federal law. *Memphis Light, Gas & Water Division v. Craft*, 461 U.S. 1, 9 (1978). But the Court has never read the Takings Clause to compel the states to recognize property interests, much less property interest in land, that have no basis in state law. *Cf. Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (addressing whether state-recognized rights in trade secrets "qualify" as property for the purpose of the Takings Clause). Contrary to the argument of one of petitioner's *amici*, *see* Brief of National Association of Homebuilders, the fact that the Court has ruled that the meaning of the term "property" in a federal statute should be treated as involving a question of federal law, *see United States v. Craft*, 535 U.S. 274 (2002), hardly supports the idea that the federal Constitution, which is replete with

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Furthermore, the theory that the Takings Clause can be read to mandate the content of state property law flies in the face of the Court's landmark decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). In that case the Court held that the federal courts lack the authority to develop and apply a general federal common law to resolve questions about the content of state common law. As Justice Brandeis wrote:

> Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. *And no clause in the Constitution purports to confer such a power upon the federal courts.*

Id. at 78 (emphasis added). *Erie* reflects the Court's understanding that rulings of state courts on matters of state law are definitive expressions of the will of the states in their sovereign capacities and that the federal judiciary lacks the constitutional authority to promulgate national legal rules that trump state law. In the Court's words:

> '[L]aw in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing

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provisions designed to safeguard the legal and political autonomy of the states, should be read in the same fashion.

> by the authority of that State without regard to what it may have been in England or anywhere else. . . .' 'The authority and only authority is the State, and if that is so, the voice adopted by the State as its own . . . should utter the last word.'

Id. at 79, quoting *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 533-34, 535 (1928) (Holmes, J., dissenting). *See generally* Frank I. Michelman, *Property, Federalism, and Jurisprudence: a Comment on Lucas and Judicial Conservatism*, 35 Wm. & Mary L. Rev. 301 (1993) (discussing the serious tension between the principle of *Erie* and the notion that federal courts in takings cases might exercise a close supervision over state court definitions of state property interests).

The theory of judicial takings is even more problematic because it implies a federal power to police the *evolution* of state law. Common law courts, by their nature, are authorized to modify legal rules over time "in light of changed circumstances, increased knowledge, and general logic and experience." *Rogers v. Tenn.*, 532 U.S. 451, 464 (2001). Based on this understanding of the common law process, the Court's cases have "clearly established that '[a] person has no property, no vested interest, in any rule of the common law.'" *Duke Power v. Carolina Envtl. Study Group*, 438 U.S. 59, 88 n.32 (1978), *quoting Second Employers' Liability Cases*, 223 U.S. 1, 50 (1912), in turn quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1877). If no person can claim an entitlement to

any particular rule of the common law, it is difficult, to say the least, to see how a judicial modification of a common law rule can give rise to a taking.

The conclusion that state common law definitions of property are beyond the direct control of the federal government means that private property regimes will vary from state to state and over time, as they obviously do generally and in the case of littoral property rights specifically. *See Walton County v. Stop the Beach Renourishment*, 998 So.2d 1102, 1111 n.9 (Fla. 2008) (observing that "the law regarding littoral rights varies among the states," and distinguishing the law of Florida from that of Mississippi and North Carolina); *see also Shively v. Bowlby*, 152 U.S. 1, 26 (1894) (discussing the diverse laws of littoral ownership adopted by the thirteen original states). This diversity is not to be lamented but rather celebrated as the intended and desirable result of a federalist system that respects and supports the independent law-making authority of each sovereign state. This diversity promotes choice for our citizens in selecting the kinds of communities in which to live and work and provides room for valuable social experimentation.

At the same time, there is no logical inconsistency between the diversity of state property law and the idea that the Bill of Rights establishes fixed national rules. As Justice Scalia has explained:

> There is nothing new or surprising in the proposition that our unchanging Constitution refers to other bodies of law that might themselves change. The Fifth Amendment provides, for instance, that 'private property' shall not 'be taken for public use, without just compensation'; but it does not purport to define property rights. We have consistently held that 'the existence of a property interest is determined by reference to "existing rules or understandings that stem from an independent source such as state law."' The same is true of the Fourteenth Amendment Due Process Clause's protection of 'property.' This reference to changeable law presents no problem for the originalist. No one supposes that the *meaning* of the Constitution changes as States expand and contract property rights.

Georgia v. Randolph, 547 U.S. 103, 144 (2006) (Scalia, J., dissenting) (emphasis in original) (internal citations omitted).

The logical outcome is that this Court, exercising a proper judicial restraint, must allow federal constitutional claims to fail in some cases based on state judicial rulings about the scope of private property interests with which a majority of the Court might disagree if it had authority to decide the state law issue. As the Court explained in *Sauer*:

> This court, whose highest function is to confine all other authorities within the limits prescribed for them by the fundamental law,

> ought certainly to be zealous to restrain itself within the limits of its own jurisdiction, and not be insensibly tempted beyond them by the thought that an unjustified or harsh rule of law may have been applied by the state courts in the determination of a question committed exclusively to their care.

206 U.S. at 547.

Practical Problems With the Judicial Takings Theory. Apart from the constitutional reasons for rejecting the judicial takings theory, the theory raises a host of difficult questions about where and how such a claim might be litigated. It would be difficult for this Court to hear every possible claim of a judicial taking, both because there would generally be no factual record to support a takings analysis, *see Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1213 (1994) (Scalia, J. dissenting), and because this type of litigation would create serious and long-lasting tensions between the federal and state court systems. In the past, the Court has described the relationship between the federal and state courts as one of "cooperative judicial federalism," *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974); embracing the judicial takings theory would obviously undermine cooperation. So-called judicial takings claims might be remanded to state trial courts, but that arrangement would put state trial courts in the seemingly untenable position of reviewing the constitutionality of rulings by the states' highest courts.

The obstacles to litigating judicial takings claim in federal District Court appear even more formidable. First, while this Court has never directly addressed the issue, *cf. City of Monterey v. Del Monte Dunes at Monterey Ltd.*, 526 U.S. 687, 741 (1999) (holding that the Eleventh Amendment did not bar a takings suit against a municipality in federal court, but recognizing that the issue of the immunity of a state from a takings suit in federal court raised a distinct issue), the consensus among the federal courts of appeals that have addressed the issue is that the Eleventh Amendment makes the states immune from suit in federal court under the Takings Clause without their consent. *See, e.g., DLX, Inc. v. Ky.*, 381 F.3d 511, 526 (6thCir. 2004); *Harbert Int'l, Inc. v. James*, 157 F.3d 1271, 1277 (11thCir. 1998).[3] Because the state courts are a branch of the state, a state would be immune from liability in federal District Court based on the rulings of its courts.

Second, a takings suit in federal District Court based on a state judicial ruling would apparently be barred under the *Rooker-Feldman* doctrine. This

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[3] In *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. at 316 n.9, the Court rejected the argument that sovereign immunity doctrine barred the conclusion that the presumptive remedy for a violation of the Takings Clause should be monetary relief. That reasoning does not answer the question whether the states, absent their consent or a valid abrogation of immunity, possess immunity from suit under the Takings Clause based on the Eleventh Amendment.

doctrine prohibits a federal District Court from exercising subject matter jurisdiction over a lawsuit complaining of an injury caused by a state court judgment and seeking review and rejection of the judgment. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 291 (2005). The basis of the doctrine is 28 U.S.C. §1257, which confers exclusive jurisdiction to review the final judgments of state courts upon this Court, and inferentially bars the District Courts from exercising the same jurisdiction. *Id.* While the Court has recently emphasized "the narrowness of the *Rooker-Feldman* rule," *Lance v. Dennis*, 546 U.S. 459, 464 (2006), the doctrine would appear to clearly apply to a claim that a state court effected a "judicial taking." *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) (ordering dismissal for lack of jurisdiction of a suit in federal District Court challenging federal constitutionality of a state court ruling). Tellingly, a leading academic advocate of the judicial takings theory has acknowledged that the *Rooker-Feldman* doctrine might well bar collateral attacks on state court decisions based on a takings theory in federal District Court. *See* Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. R. 1449, 1511 (1990) ("Because of the limited authority of federal district courts to review state court decisions collaterally . . . , only the United States Supreme Court may be able to hear most judicial takings challenges to state decisions.").

Notwithstanding the *Rooker-Feldman* doctrine, a few lower federal courts have entertained claims that

state court rulings impaired property rights in violation of the federal Constitution. *See, e.g., Robinson v. Ariyoshi*, 441 F. Supp. 559 (D.Haw. 1977), *aff'd in part and rev'd in part*, 753 F.2d 1468 (9thCir. 1985), *vacated and remanded*, 477 U.S. 902 (1986), *dismissed on ripeness grounds*, 887 F.2d 215 (9thCir. 1989); *Sotomura v. County of Hawaii*, 460 F. Supp. 473 (D.Haw. 1978). But, in our view, the U.S. Court of Appeals for the Fifth Circuit adopted the better approach in affirming, based on the *Rooker-Feldman* doctrine, an order dismissing a claim that an allegedly "erroneous and unpredictable decision" of the Georgia Supreme Court violated the Takings Clause. *Reynolds v. State of Georgia*, 640 F.2d 702 (5thCir. 1981).

Finally, assuming that state courts may be open to hear federal takings claims based on judicial rulings, judicial takings claims based on state court rulings would not be ripe for consideration in federal District Court, at least in the first instance, because the claimants would not have exhausted available state compensation remedies. *See Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

On a yet more practical level, the judicial takings theory is in serious tension with the practice of the federal courts to defer routinely to state courts on issues of state law, precisely because they have been recognized by this Court as the "final expositors" of state law. With the encouragement of the Court, *see Lehman Bros. v. Schein*, 416 U.S. 386 (1974)

(vacating judgment and remanding case so appeals court could consider certification of issue to the Florida Supreme Court in view of "the novelty of the question and the great unsettlement of Florida law"), all or virtually all states have adopted procedures for accepting certification of state law issues from federal courts. *See* 17A Wright & Miller, *Federal Practice and Procedure* §4248 (3d ed. 2007). Federal courts frequently invoke the certification procedure to obtain state court resolution of state property law questions. *See, e.g., Klamath Irrigation Dist. v. United States*, 532 F.3d 1376 (Fed.Cir. 2008) (certifying question of state water law in pending takings case to the Oregon Supreme Court). The basic premises of this procedure are that the federal courts stand as "outsiders" relative to the state legal system, and that the state courts are uniquely competent to resolve state law issues. *Lehman*, 416 U.S. at 391.

Various branches of federal abstention doctrine are also based on the premise that state courts should resolve issues of state law. In *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941), invoking its "scrupulous regard for the rightful independence of the state governments," *id.* at 501, quoting *Di Giovanni v. Camden Ins. Ass'n*, 296 U.S. 64, 73 (1935), the Court held that a federal District Court, rather than resolving a disputed issue of state law itself, should have deferred to the Texas Supreme Court to obtain a "definitive ruling" on the issue. *Id.* at 501. In *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), the Court declared that, when faced with a

claim arising from a complex state administrative process, a federal court should consider dismissing the action in favor of a state proceeding to avoid "[d]elay, misunderstanding of local law, and needless federal conflict with State policy." *Id.* at 326.

There is a considerable conflict between the idea of allowing the filing of claims under the Takings Clause based on state court rulings on state property law issues and the foregoing doctrines mandating that federal courts defer to state courts for definitive rulings on issues of state law. Is a state court, after resolving a state legal question at the behest of a federal court, to be met with a claim that its ruling subjects the state to financial liability under the Takings Clause? If the answer were "yes," state courts would accept case referrals from federal courts far less frequently in the future.

Petitioner's Arguments. Petitioner and its allies make various arguments in favor of the judicial takings theory, none of which is convincing. They cite a handful of state court decisions on state law property issues that also involved or implicated potential federal taking claims that they contend justify dramatic expansion of traditional takings doctrine. Apart from the fact that these cases are relatively few in number, all appear to involve reasonable, or at a minimum defensible, interpretations of state law. Even under petitioner's theory, not every state judicial ruling altering state law should trigger takings review and the cases cited clearly are

neither so numerous nor so out of bounds as to support a revolution in takings doctrine.[4]

Furthermore, contrary to petitioner's argument, there is absolutely nothing in the recent state court decisions that represents any kind of break from the common law tradition of courts modifying private property interests, particularly in relation to water, to reflect new conditions and social values. *See, e.g., Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882) (repudiating riparianism in favor of prior appropriation doctrine in view of the "imperative necessity" created by arid conditions in the west); *Martin v. Bigelow*, 2 Vt. 184 (1827) (repudiating natural flow riparian doctrine in favor of reasonable use doctrine to facilitate "reasonable" industrial uses of Vermont's rivers). Thus, the suggestion that the judicial takings theory can be justified at this late date as a response to modern-day judicial adventurism is fallacious.

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[4] Weighing on the other side of the argument are state court decisions declining to adopt seemingly sensible modifications of common law rules specifically to avoid adversely affecting existing property interests. *See, e.g., Bott v. Michigan Department of Natural Resources*, 327 N.W.2d 838 (Mich. 1982); *cf. State ex rel. Martinez v. City of Las Vegas*, 89 P.3d 47 (N.M. 2004) (exercising equitable authority to mitigate effects of judicial modification of state water allocation rules). Because the state courts are aware of the consequences of changes in common law rules for property owners, and evidently shape their decisions to avoid or mitigate these effects, there is even less reason for this Court to embark on the radical innovation advocated by petitioner and its allies.

Petitioner and its allies contend that this Court should make no distinction between judicial rulings and actions by the executive and legislative branches. They contend that all types of state government actions should be subject to challenge under the Takings Clause on the same basis and that the tests to identify takings should be the same in all contexts. This appeal for parallel treatment fails on several grounds.

Most fundamentally, the argument ignores the fact, discussed at length above, that our system of federalism makes the state courts the final expositors on state law issues and neither this Court nor any other federal court has the authority to supervise state judicial law-making, especially on issues arising from the development of a state's common law of property.

In addition, the language of the Takings Clause itself provides a basis for generally treating the actions of the legislative and executive branches differently from judicial rulings on property law questions. Government measures restricting or otherwise intruding on recognized private property rights are evaluated as potential "takings," with the inquiry typically focusing on whether the measure is so economically burdensome as to be the functional equivalent of a physical occupation or appropriation. By contrast, judicial rulings on the nature and scope of property interests involve the meaning of the term "property." As discussed, the terms "property" and "taking" are further differentiated by the fact that the

meaning of the first is governed by state law, whereas the meaning of the second is governed by federal law. Given these differences, there is no reason to assume, and indeed there is strong reason not to assume, that judicial rulings on common law property issues should be evaluated under the Takings Clause in the same fashion as other government actions.

Furthermore, state courts have a recognized institutional responsibility and capacity to defend federal constitutional rights that distinguishes them from other branches of state (or local) government. This Court has "emphatic[ally] reaffirm[ed] . . . the constitutional obligation of the state courts to uphold federal law," and has "express[ed] . . . confidence in their ability to do so." *Allen v. McCury*, 449 U.S. 90, 105 (1980). The Court's recognition that the state courts are full partners with the federal courts in protecting federal constitutional rights is surely related to the fact that the state courts are organized in a hierarchical system supervised by a single high court. As a practical matter, preserving the independent decision-making authority of the state courts in matters of state law involves less risk to federal constitutional interests than would be case with, for example, the policy-making authority of the many thousands of local government units across the country.

Finally, the concept of a judicial taking raises particular federalism concerns because it would involve federal intrusion into an area specifically reserved to the states. As Justice Kennedy explained

in *Alden v. Maine*, 527 U.S. 706 (1999), our federal system preserves the independent sovereign status of the states, in part, by:

> reserv[ing] to [the states] a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status. The States 'form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.'

Id. at 714, quoting The Federalist No. 39, p. 245 (J. Madison) (C. Rossiter ed. 1961). The Court has repeatedly said that the task of defining and developing the basic rules of real property law unquestionably falls within the "sphere" reserved to the states as independent sovereigns. *See, e.g., Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 484 (1988). Thus, federal court review of state court rulings on issues of state real property law would directly intrude upon the states' portion of national sovereignty, including "the dignity and essential attributes inhering in that status."

Contrary to the position of some of petitioner's *amici*, the regulatory takings doctrine, as applied to other branches of state and local government, does not intrude on federalism values to the same degree that a judicial takings doctrine would. While state and local governments exercise a substantial portion of the nation's authority to regulate property, that

authority is by no means reserved to them. *See, e.g.*, *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990) (federal regulation of rail banking); *Babbitt v. Sweet Home Chapter, Cmtys. for a Greater Oregon*, 515 U.S. 687 (1995) (regulation of land use under the Endangered Species Act). Furthermore, a ruling that a unit of local government can only proceed with a valid regulation on the condition that it pay financial compensation, though no doubt burdensome, is certainly less intrusive than would be an order essentially striking down a state court ruling as "result driven . . . judicial reengineering of the case," as petitioner would have it. (Pet. Br. at 16, 23).

II. THE COURT ALREADY HAS THE AUTHORITY TO ADDRESS PRETEXTUAL STATE COURT RULINGS DESIGNED TO CIRCUMVENT FEDERAL CONSTITUTIONAL PROTECTIONS.

The conclusion that a property owner cannot bring a taking claim based on a state court ruling on an issue of state common law of property does not preclude property owners from avoiding the effect of egregious state court rulings illegitimately designed to subvert the protection of the Takings Clause or any other provision of the Constitution. While it has never embraced the theory of a judicial taking, the Court has recognized that, when a state court ruling apparently rests on an adequate and independent state law ground, a party can present, and this Court can consider, an argument about whether the state

law ruling actually represents an adequate and independent ground. Thus, the Court has "long held" that it has "an independent obligation to ascertain whether a judgment defeating the enforcement of federal rights rests upon a valid nonfederal ground and whether that ground finds 'fair or substantial support' in state law." *Howlett v. Rose*, 496 U.S. 358, 366 n.14 (1990). This exception to the general rule that the federal courts are the "final expositors" of state law is rooted in "this Court's ultimate authority to review state-court decisions in which 'any title, right, privilege, or immunity is specially set up or claimed under the Constitution.'" *Howlett*, 496 U.S. at 366 n.14, *quoting* 28 U.S.C. §1257(a). In other words, the fair or substantial test is ultimately based on the Supremacy Clause, which necessarily includes the power to avoid state court rulings on state law issues that unreasonably and illegitimately seek to evade the command of federal law. *See Ward v. Board of County Comm'rs*, 253 U.S. 17, 22-23 (1920).

While the established fair or substantial test may not subject the state courts to the close and rigorous policing advocated by some of petitioner's *amici*, this time-tested standard largely addresses the basic concerns they raise, while according a larger measure of deference to the state courts.

The fair or substantial basis test allows the Court to exercise jurisdiction over state law issues to the extent necessary to protect and enforce supreme federal law generally; it is not an inquiry specific to takings cases. A takings claimant can challenge the

dismissal, on the ground that the claimant does not possess a protected state law property interest to begin with, of a takings suit based on some legislative or executive branch action, by arguing that the state law ruling has no fair or substantial basis. *See, e.g., Demorest v. City Farmers Trust Co.*, 321 U.S. 36 (1944). In addition, however, the Court has applied this test in a variety of other contexts, including to factual determinations related to federal claims, *see, e.g., Ward v. Board of County Comm'rs*, rulings on state procedural issues, *see, e.g., NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449 (1958), and determinations about other substantive state law issues that are logically antecedent to federal law claims. *See, e.g., Bouie v. City of Columbia*, 378 U.S. 347 (1964).

The fair or substantial basis test calls for highly deferential review, consistent with the principles that the state courts have the final word on state law and can be relied upon to defend federal constitutional interests in the same fashion as federal courts. The Court has said that the key inquiry is whether, considering all relevant circumstances, the state court ruling was consciously designed to "evade" or "subvert" a federal constitutional right. *See Fox River Paper Co. v. Railroad Comm'n*, 274 U.S. at 655; *Mullaney v. Wilbur*, 421 US at 691 n.11; *cf. Sauer*, 206 U.S. at 556 (leaving open the possibility of setting aside a state court state law ruling as an "evasion"). Professor Laura Fitzgerald has summarized the appropriate test as follows: "[T]he Court may claim appellate jurisdiction to reverse state-court state-law

judgments . . . only where it can identify and substantiate some concrete indication that the state court has deliberately manipulated state law to thwart federal law and then evade Supreme Court review." Laura S. Fitzgerald, *Suspecting the States: Supreme Court Review of State-Court State-Law Judgments*, 101 Mich. L. Rev. 80, 89 (2002). It is not enough under this standard that the state court ruling departs from prior precedent or that this Court would have arrived at a different result if it had the authority to define state law. *See Fox River*, 274 U.S. at 657 (in applying the fair or substantial basis test "[w]e are not concerned with the correctness of the rule adopted by the state court, its conformity to authority, or its consistency with related legal doctrine"); *cf. Rogers v. Tenn.*, 532 U.S. at 464 (upholding criminal murder conviction, based on retroactive overruling of common law rule that would have barred conviction, because the change in the common law was not so "unexpected and indefensible" as to violate the Due Process Clause).

Significantly, the Court has recognized in a variety of contexts that the legislative branch has broad discretion to modify common law rules. "The Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object, despite the fact that otherwise settled expectations may be upset thereby." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978) (internal quotations and citations

omitted). Federal judicial review under the Constitution of judicial common law rulings obviously cannot be any less deferential than federal court review of legislation modifying common law rules.

Applying the fair or substantial test is relatively straightforward when a claimant has asserted a taking claim based on some legislative or executive branch measure, the state court has rejected the claim on the ground that no property interest exists under state law, and the claimant contends that the state law ruling has no fair or substantial basis. In that scenario, in the rare case where the fair or substantial basis argument actually succeeds, the Court should simply disregard the state law ruling and proceed to address the underlying taking claim on the merits.

It is less clear how the Court should address a fair or substantial argument if there is no underlying federal taking claim based on a legislative or executive branch measure, and the claim, in effect, is that a free-standing judicial ruling on a state law issue exposes an owner to the risk of future legislative or executive branch action which, but for the state law ruling, would constitute a taking. The fact that this hypothetical case involves no explicit federal taking claim tends to undermine any possible argument that the ruling was made for the purpose of evading or subverting a federal constitutional right. But it does not necessarily preclude the argument. However, such a claim would not present a ripe claim based on the Supremacy Clause because the state law

ruling has not yet been interposed to impede a federal claim. In other words, any claim that a state law ruling lacks a fair or substantial basis and threatens to impede potential future takings claims would have to await a ripe claim based on actual application of the state law ruling to defeat a federal claim based on some independent government action. It cannot sensibly be argued that a state law ruling lacks a fair or substantial basis when no federal taking claim based on some legislative or executive branch action has actually been litigated in state court.

While petitioner's legal theory is not entirely clear, petitioner appears to rest on a judicial takings theory rather than a fair or substantial argument. Therefore, the Court can properly dismiss this case and defer possible consideration of the proper application of the fair or substantial test to some case that squarely raises the issue. If the Court views the fair or substantial argument as having been presented, the petitioner's case should be rejected for several reasons. First, as discussed by respondents, the Florida Supreme Court's ruling on the nature and scope of littoral owners' property interests is consistent with Florida precedent and, at the very minimum, has a fair or substantial basis. Furthermore, as respondents have also explained, petitioner cannot contend that the state law ruling impeded consideration of any federal taking claim based on the Beach and Shore Preservation Act because petitioner challenged the Act as a taking under the Florida Constitution, not the U.S. Constitution. Finally, to

the extent the petitioner can be viewed as making a free-standing argument that the Florida court's interpretation of state law lacks a fair or substantial basis, and that that ruling might impede some future federal takings claim, the argument is neither ripe nor meritorious.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Florida Supreme Court.

Respectfully submitted,

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October 2009

AMICUS CURIAE BRIEF

20

No. 08-1151

In the
SUPREME COURT OF THE UNITED STATES

STOP THE BEACH RENOURISHMENT, INC.,

Petitioner,

v.

FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION, et al.,

Respondents.

ON WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

BRIEF OF *AMICUS CURIAE*, BREVARD COUNTY, FLORIDA, IN SUPPORT OF RESPONDENTS

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BRIEF OF *AMICUS CURIAE*, BREVARD COUNTY, FLORIDA, IN SUPPORT OF RESPONDENT

Amicus Curiae, Brevard County, Florida, respectfully files it Brief in Support of Respondent, Florida Department of Environmental Protection, in this case as follows:

STATEMENT OF IDENTITY OF *AMICUS CURIAE* AND INTEREST IN THE CASE

Brevard County presents this statement of identity and interest in support of its contention, as *amicus curiae* to this Honorable Court.

Brevard County is a political subdivision of the State of Florida located on the Atlantic coast in the state's central region. Brevard has the state's longest beach at 71.6 miles, nearly 9 percent of all the beaches in Florida.[1] This shoreline is marked by dune bluffs, in

[1] 71.6 miles/825 miles = 8.7%. *See* Ralph R. Clark, "Beaches Conditions in Florida: a Statewide Inventory and Identification of the Beach Erosion Problem Areas in Florida", Division of Beaches and Shores Technical and Design

some places rising nine feet or more above the toe of the dune about 50 to 100 yards from the water's edge. In many areas of the County, beachfront lots are sandwiched within a 150 to 200 foot area between the dune line on the beach and U.S. Highway A1A. In many cases, privately owned houses, condominiums and other structures have been built upon narrow, shallow beachfront lots and, due to beach erosion, the foundations of some of those privately owned structures have been compromised or threatened after an avulsive storm event leaving the upland edge of the dune line within feet of the eroded sheer faces of sandy cliffs located within yards of the churning ocean.

Brevard County's highly sloped beach and dune system offer the only buffers between improved private property and the ocean's persistent, grinding erosion,

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Memorandum 89-1, Fla. Dept. of Envtl. Prot., 5th ed. 1993, http://www.dep.state.fl.us/beaches/publications/tech-rpt.htm#Length_of_Shoreline

which threatens, and in some cases has caused, the destruction of private beachfront structures. Unlike Walton County and other areas along Florida's panhandle region, Brevard County's private beachfront structures are built on elevated land at the ocean's edge as compared to panhandle structures which are typically built on stilts driven into the much wider and flatter expanses of beach on Florida's Gulf of Mexico coast.

In Brevard, in many instances, beachfront structures lie precariously close to the rims of cliffs formed by erosion that, year after year, pose a constant threat to private property—homes, condominiums and other structures—having a total value in the billions of dollars. Beach renourishment has worked to ward off the threat to these privately owned structures posed by

the frequent avulsive erosion generated by the Atlantic Ocean.

In Brevard, about two-thirds of the County's beaches have suffered erosion and over half are critically eroded according to state environmental officials.[2] In fact, nearly 10 percent of Florida's 491.9 miles of eroded coastline lies in Brevard County.[3] Presently, the State of Florida, its subdivisions, and the federal government spend millions of dollars each year to renourish eroded shorelines, with hundreds of millions more projected over the next decade.[4] The

[2] 65.4 percent of Brevard's shoreline is eroded; 51 percent is classified as critically eroded. "Critically Eroded Beaches in Florida", Bureau of Beaches and Coastal Systems, Fla. Dept. of Envtl. Prot., 2009 at 6. http://www.dep.state.fl.us/beaches/publications/pdf/CritEroRpt09.pdf

[3] 9.5 percent of all the eroded shoreline in Florida and 9.2 percent of all *critically* eroded shoreline in Florida is in Brevard County. *supra* at n.2 at 3, 6.

[4] *See e.g.*, "Florida Beach Management Program: Long Range Budget Plan", Bureau of Beaches and Coastal Systems, Fla. Dept. of Envtl. Prot., 2009. http://www.dep.state.fl.us/beaches/programs/pdf/fy-09-19.pdf

sand used to renourish eroded beaches is akin to an energy absorbing sponge that mitigates erosion impacts from the storm driven pounding of waves on the beach and dune system, as well as the impacts from a persistently rising sea. Left unchecked, the seas would march forward, gradually swallowing protective dunes and encroaching on the upland closer and closer to the thresholds of private beach front homes until the scouring wave action undermines foundations and structures collapse.

Not only do renourishment efforts protect private property, those efforts maintain beaches for public enjoyment, support Brevard's tourism industry, and protect natural wildlife habitats.

The renourishment process is incredibly expensive and hard costs will continue to grow with the future depletion of sand that is both practically

available and suitable as material for renourishment sand.[5] The looming economic reality of a ruling in favor of the Petitioner from this Court is predictable. Government leaders faced with the prospect of paying out substantial sums in takings compensation while facing the correspondingly substantial costs of beach renourishment in times of diminishing revenues may be forced to opt out of renourishment projects. To opt out means to let nature take its course, and along with it the inevitable, catastrophic results for owners of private property abutting the shoreline in Brevard County who stand to lose their homes, which for many represents all of their economic security.

The economic and environmental disaster that is sure to accompany an unmitigated, relentless march

[5] *See* § 161.144, Fla. Stat. (2009). "The Legislature recognizes that beach-quality sand for the nourishment of the state's critically eroded beaches is an exhaustible resource, in ever-decreasing supply . . . ." *Id.*

of the sea would be unprecedented. Not only would private property owners see their homes and, in some cases, businesses destroyed, but the public would lose a classic venue for recreation that annually attracts hundreds of thousands of users who are vital to the economic well-being of Brevard County's hotels, restaurants, and beachside businesses. Millions of dollars spent each year by tourists and beach goers from near and far could be swept away with the unchecked erosion of the County's shoreline. Likewise, loss of the beach would result in destruction of wildlife habitat for species such as sea turtles, which, for hundreds of thousands of years, have trekked in droves to Brevard's beaches to dig nests for their hatchlings.

Brevard County may find itself in an untenable situation should it be faced with unworkable renourishment economics. Brevard is party to a long-

term renourishment funding agreement with the United States Army Corps of Engineers, which itself is obligated to maintain the condition of certain Brevard County beaches by virtue of a settlement agreement with a group of beachfront property owners along the beaches in specific sections in the County. If substantial takings compensation is to be added to the enormous cost of renourishment, then Brevard, as a provider of local matching funds faced with additional looming budget shortfalls, may be unable to extend its nourishment project. The same may be true for the County's renourishment partners, the State of Florida and the U.S. Army Corps of Engineers.

Thus, pursuant to Supreme Court Rule 37.4, Brevard County, Florida submits this brief in support of the Respondents in this case in order to allow the

County to present its arguments on the issues presented in the Petitioner's Brief.

SUMMARY OF THE ARGUMENT

A conflict exists between section 161.141, Florida Statutes, and section 161.191(1), Florida Statutes, relating to ownership of beach restoration sand deposited by the state landward of the mean high water line (MHWL), which occurred in this case. Section 161.141, Florida Statutes, vests ownership of such "additions to the upland property" in the upland owner, which has the legal effect of establishing the MHW as the boundary between sovereign and private ownership once beach restoration sand is deposited by the government on private riparian property. Therefore, this statute could be construed as leaving the Petitioner's asserted "right of contact" with the MHWL and derivative littoral rights intact.

In contrast, section 161.191(1), Florida Statutes, vests title to all lands landward of the erosion control line (ECL) in the upland owner, which, depending upon the location of the ECL—seaward from, landward from or coextensive with the MHWL—may either enhance upland ownership rights, reduce those rights or leave those rights intact, with the exception of the common law right of accretion and the common law burden of erosion which are supplanted by the "statutory accretion" rights provided for in section 161.141, Florida Statutes. Under section 161.191(1), therefore, the Petitioner's asserted "right of contact" and derivative littoral rights may or may not be left intact, depending on the location of the MHWL.

Since the Florida Supreme Court decision in *Walton County v. Stop the Beach Renourishment, Inc.* below, determined that record did not establish the

location of the ECL relative to the MHWL, the conflict between the above-referenced provisions in the Beach and Shore Preservation Act (the Act) was not considered or resolved by the Florida Supreme Court. The resolution of that statutory conflict is required before a determination can be made as to whether the Petitioner's asserted right of contact with the MHWL has been taken by operation of the statute. That determination, involving a construction of a state statute, is reserved to the Florida courts under the Tenth Amendment and no judicial taking can be claimed until that issue has been decided.

Moreover, for three reasons, the common law right of accretion has not been eliminated by section 161.191(2) of the Act, as claimed by the Petitioner. First, the common law right of imperceptible accretion has been supplanted by a superior, noticeable and

immediate right of "statutory accretion" as long as the government fulfills its statutory duty to construct, complete and maintain a beach restoration project. Second, if the government fails in that duty, the Act contains a statutory reverter which reinstates the common law right of accretion, as well as the common law burden of erosion.

Finally, the common law burden of erosion borne by the upland owner was the historical policy reason for vesting the upland owner with the common law right of accretion. Under the Act, the burden of erosion is also suspended for the upland owner since the government is under a statutory duty to maintain the beach restoration project designed to prevent erosion. Therefore, the policy reason for the common law right of accretion does not exist as long as the government fulfills its statutory duty. As a result, the statutes

suspending the common law do not affect a taking and the Florida Supreme Court's failure to require the initiation of eminent domain proceedings, as provided for in the Act, is not a judicial taking.

ARGUMENT

I. Conflicting provisions in the Florida Beach and Shore Preservation Act, as applied to the evidence of record in this case, create an unresolved issue of state law as to whether the mean high water line has been supplanted by the erosion control line as the boundary between sovereign lands and private riparian uplands. Under the Tenth Amendment, that statutory conflict must be resolved by the Florida judiciary before a judicial takings claim based upon loss of contact with the mean high water line can be asserted.

A. Background

Petitioner glosses over the portion of Justice Stewart's concurring opinion in *Hughes v. State of Washington*, 389 U.S. 290 (1967), conceding "as a general proposition that the law of real property is,

under our Constitution, left to the individual States to develop and administer" and that the state "is free to make changes, either legislative or judicial, in its general rules of real property law, including the rules governing the property rights of riparian owners." *Hughes*, 389 U.S. at 295. Of course, the constitutional provision alluded to by Justice Stewart is the Tenth Amendment, which reserves to the states the powers not delegated to the United States nor prohibited to the states by the Constitution. U.S. Const., amend. X; *see Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Absent a taking, the state's enactment and interpretation of laws regulating beach erosion is a matter of state law reserved to the states by the Tenth Amendment.

The Petitioner has also conveniently ignored 190 years of background principles in substantive Florida

law which has continuously subordinated the common law to the acts of the Legislature.[6] Likewise, the Petitioner has also ignored 100 years of background principles of substantive property law making the littoral rights of riparian upland owners subject to regulation by Florida's Legislature. *Broward v. Mabry*, 58 Fla. 398, 50 So. 826 (1909).

One law falling within both of the above-stated background principles is Florida's Beach and Shore Preservation Act, Chapter 161, part I, Florida Statutes,[7] (the Act) which, at its core, is a

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[6] Section 2.01, Florida Statutes, was first enacted in 1829 when Florida was still a territory and the provision has continuously been a part of Florida statutory law since that time. The statute reads as follows:

2.01 Common law and certain statutes declared in force.—The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the 4th day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state.

[7] §§ 161.011-242, Fla. Stat.

comprehensive law establishing a regulatory framework designed to preserve the Florida beach and dune systems that protect private upland properties, as well as public beaches from the economic menace posed by severe erosion generated by the avulsive hurricanes, tropical storms and nor'easters that frequently plague Florida's peninsular coastline bounded by the Atlantic Ocean, Gulf of Mexico and Straits of Florida.[8] The comprehensive regulatory scheme set up under Chapter 161, part I, Florida Statutes, includes the establishment of coastal construction control lines,[9] coastal construction setbacks,[10] rigid coastal armoring regulations,[11] erosion control and beach restoration and

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[8] §§ 161.088 and 161.141, Fla .Stat.

[9] § 161.053, Fla. Stat.

[10] § 161.052, Fla. Stat.

[11] § 161.085, Fla. Stat.

nourishment,[12] though only the beach restoration and nourishment provisions are relevant in this case.

The Act was adopted forty-four years ago and substantially revised thirty-nine years ago, as Chapter 65-408, Laws of Florida and Chapter 70-276, Laws of Florida, respectively. The Legislature's stated purposes for the adopting the Act were as follows.

> The Legislature finds and declares that the beaches in this state and the coastal barrier dunes adjacent to such beaches, by their nature, are subject to frequent and severe fluctuations and represent one of the most valuable natural resources of Florida and that it is in the public interest to preserve and protect them from imprudent construction which can jeopardize the stability of the beach-dune system, accelerate erosion, provide inadequate protection to upland structures, endanger adjacent properties, or interfere with public beach access.

§ 161.053, Fla. Stat.

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[12] § 161.141, Fla. Stat.

> Because beach erosion is a serious menace to the economy and general welfare of the people of this state and has advanced to emergency proportions, it is hereby declared to be a necessary governmental responsibility to properly manage and protect Florida beaches fronting on the Atlantic Ocean, Gulf of Mexico, and Straits of Florida from erosion and that the Legislature make provision for beach restoration and nourishment projects, including inlet management projects that cost-effectively provide beach-quality material for adjacent critically eroded beaches.

§ 161.088, Fla. Stat.

The beach restoration and nourishment component of the Act is designed to implement these legislative policies. Section 161.141 of the Act clearly contemplates government renourishment of the state's beaches at government expense to either restore beaches after or protect beaches from the avulsive erosion caused by hurricanes, tropical storms and other weather related events frequently experienced in

Florida. Specifically, section 161.141 pertains to the state restoration of eroded beach landward of the mean high water line in the interest of preserving the beach for the protection of the state's economy, the general public welfare, private upland structures and private property adjacent to the state's beaches. In effect, the Act allows the expenditure of public funds for mixed public and private purposes associated with the state's beaches, supplanting the need for riparian upland owners to incur the expense of restoring their private beach up to the mean high water line after an avulsive event, as they are entitled to do under Florida common law. *Walton County v. Stop the Renourishment, Inc.*, 998 So. 2d 1102 (Fla 2008)

B. The Dispute

In this case, Petitioner asserts that, notwithstanding the lack of permission from the

landowners, the Walton County Commission demanded that its beach restoration contractor enter upon the Petitioner's members' private properties to place the sand required by engineering specifications for a county beach restoration project performed in accordance with the Act.[13] Petitioner further asserts that the county's restoration contractor trespassed upon the property of at least two of the Petitioner's members, dumping tons of sand on their property thereby changing its character.[14] Since the Petitioner's members are riparian owners[15] who presumably claim title to the mean high water line (MHWL), the sand had to be dumped landward of the MHWL on the property of at least two members to result in a trespass, although it is unclear whether any sand was

[13] Pet. Brief, 11-12

[14] Pet. Brief, 11-12

[15] Pet. Brief, 13, n.12

placed landward of the MHWL touching the properties owned by the remaining three members. Pet. Brief, 11-12.

The Petitioner in this case asserts it is beyond argument that Florida law has always required a property to touch or border the MHWL in order to be a littoral property with attendant littoral rights. Pet. Brief, 24. The Petitioner also asserts that "[i]f the upland property is separated from the MHWL, then the entire property is no longer littoral in character, and all littoral rights are lost." Pet. Brief, 26. It follows that Petitioner claims that Florida's Beach and Shore Preservation Act has the effect of separating its members' properties from direct contact with the MHWL.

Unfortunately for the Petitioner, the Act does contain a provision under which "additions to the

upland property landward of the established line of mean high water which result from the restoration project remain the property of the upland owner,"[16] which has the effect of granting ownership of restoration sand placed landward of the MHWL to the upland owner, thus preserving the asserted property right of contact between upland riparian property and the MHWL in the context of a beach restoration project. The statute is section 161.141, Florida Statutes, and the provision clearly applies to the two Petitioner's members owning property where renourishment sand was deposited landward of the MHWL. It is likely, although unclear, that the statute also applies to the remaining three members since it would be highly unusual if sand was not placed landward of the MHWL within the boundaries of a

[16] § 161.141, Fla. Stat.

beach restoration project where the government must "establish the line of mean high water for the area to be restored." . Section 161.141, Florida Statutes. The statute is discussed at page 1108 in the *Walton County* opinion rendered by the Florida Supreme Court and reads, in relevant part, as follows:

> **161.141 Property rights of state and private upland owners in beach restoration project areas.—**
>
> [P]rior to construction of such a beach restoration project, the board of trustees must establish the line of mean high water for the area to be restored; and *any additions to the upland property landward of the established line of mean high water which result from the restoration project remain the property of the upland owner* subject to all governmental regulations and are not to be used to justify increased density or the relocation of the coastal construction control line as may be in effect for such upland property. The resulting additions to upland property are also subject to a public easement for traditional uses of the sandy beach consistent with uses that would have been allowed prior to the

> need for the restoration project. It is further declared that there is no intention on the part of the state to extend its claims to lands not already held by it or to deprive any upland or submerged land owner of the legitimate and constitutional use and enjoyment of his or her property. (Emphasis supplied)

Although, under section 161.141, the sand placed landward of the MHWL on the Petitioner's members' property would be owned by those upland owners, as will be explained in detail below, the statute appears to potentially conflict with section 161.191(1), Florida Statutes, which states that title to land lying seaward of the erosion control line (ECL) is vested in the state. The conflict between these two statutes means that neither the Act itself, nor the Florida Supreme Court decision upholding the Act, can be deemed to be a taking because no Florida court of last resort has yet resolved or reconciled the effect of two distinct, apparently contradictory provisions in the

Act addressing the issue of post-beach restoration ownership—and attendant littoral rights—resulting from "additions" to upland property landward of the MHWL caused by the deposit of sand in a nourishment and restoration project such as the one under discussion in this case. Such statutes, and their interpretation, are matters reserved to the state under the Tenth Amendment and until this statutory conflict is resolved by Florida courts, no judicial taking can be claimed for the reasons that follow.

C. Harmonizing Conflicting Statutes to Eliminate a Taking of MHWL Contact

Section 161.141, Florida Statutes, preserves the MHWL as the basis for determining ownership of restoration-related additions to riparian upland on the restored beach. Though the effects of this "statutory accretion" resulting from beach restoration can be

noticeable and immediate (as in this case),[17] as opposed to imperceptible as required for common law accretion, under section 161.141 the property of the upland owner remains in contact with the MHWL as a result of the statutory accretion inuring to the benefit of the riparian upland owner. *Walton County,* 998 So. 2d at 1113. Under this statute, these statutory accretions are also subject to the same regulation and public easement for customary and traditional public use of sandy beaches that are embedded as background principles of Florida law. *City of Daytona Beach v. Tona-Rama*, 294 So. 2d 73 (Fla. 1974).

In contrast, and apparent contradiction, section 161.191(1) of the Act bases title to post-restoration

[17] It is worthy of note that such "additions" resulting from the restoration project are particularly noticeable on portions of Atlantic beaches where the riparian upland owner has refused permission to restore a private beach leaving a private hole surrounded on both sides by newly deposited, elevated sand once the restoration project is finished.

riparian upland on the location of the erosion control line (ECL) under which the state claims ownership to lands seaward of the ECL while vesting ownership to lands landward of the ECL in the riparian upland owner. That section reads as follows:

> **161.191 Vesting of title to lands.—**
>
> (1) Upon the filing of a copy of the board of trustees' resolution and the recording of the survey showing the location of the erosion control line and the area of beach to be protected as provided in s. 161.181, title to all lands seaward of the erosion control line shall be deemed to be vested in the state by right of its sovereignty, and title to all lands landward of such line shall be vested in the riparian upland owners whose lands either abut the erosion control line or would have abutted the line if it had been located directly on the line of mean high water on the date the board of trustees' survey was recorded.

But, according to section 161.161(5), Florida Statutes,[18] the ECL is supposed to be set using the

[18] Section 161.161(5) Florida Statutes reads as follows:

existing MHWL as a guide, which means there are three potential locations for the ECL: (1) the ECL and the MHWL can be the same line, (2) the ECL can be set seaward of the MHWL or (3) the ECL can be set landward of the MHWL.

Significantly, in this case, the Florida Supreme Court found that the record did not establish whether or not the ECL was the same as the existing MHWL.[19] As described below, in this case, the effect of the Act on littoral rights attached to the riparian upland would be uncertain because of the apparent conflict between sections 161.141 and 161.191(1), Florida Statutes. The

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161.161 Procedure for approval of projects.—
(5) The board of trustees shall approve or disapprove the erosion control line for a beach restoration project. *In locating said line, the board of trustees shall be guided by the existing line of mean high water,* bearing in mind the requirements of proper engineering in the beach restoration project, the extent to which erosion or avulsion has occurred, and the need to protect existing ownership of as much upland as is reasonably possible. (Emphasis supplied).

[19] *Walton County*, 998 So. 2d at 1117, n.15

interplay of those statutes and their effect on littoral rights is still a matter of undecided Florida law Tenth Amendment. The Petitioner's claim of a judicial taking is therefore defeated for the following reasons.

Under the title provisions of section 161.191, if the ECL is the same as the MHWL, there is no separation of littoral rights from the upland since the riparian upland owner gains all "statutory accretions" from the project landward of the MHWL and the Act preserves all other common law littoral rights[20] except accretion,[21] which is supplanted by the superior, immediate right of "statutory accretion" under section 161.141 as long as the beach restoration project is constructed and maintained—failing which, the Act provides for a statutory reverter to the common law of

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[20] § 161.201, Fla. Stat.

[21] § 161.191(2), Fla. Stat.

accretion.[22] If the ECL is located seaward of the MHWL, under section 161.191(1), the riparian owner gains title to what would have been sovereign lands located between the ECL and MHWL[23] and there is no taking since the MHWL lies within the riparian upland ownership and all common law littoral rights but common law accretion are statutorily preserved.[24]

The "taking" problem arises if the ECL is established landward of the MHWL. "But for" the operation of section 161.141, if the ECL is located landward of the MHWL, section 161.191(1) would

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[22] § 161.211, Fla. Stat.

[23] Such an alienation of sovereign lands is authorized under Art. X, section 11 of the Florida Constitution(1968):

ART. X, SECTION 11. Sovereignty lands.—The title to lands under navigable waters, within the boundaries of the state, ***which have not been alienated,*** including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people. Sale of such lands may be authorized by law, but only when in the public interest. Private use of portions of such lands may be authorized by law, but only when not contrary to the public interest. (Emphasis supplied).

[24] § 161.201, Fla. Stat.

appear to vest in the state those "statutory accretions" deposited landward of the MHWL but seaward of the ECL. If the effect of section 161.141, vesting ownership of the statutory accretions between the MHWL and the landward located ECL, is not taken into account, the application of section 161.191(1) in this ECL scenario would have the apparent effect of severing the MHWL from the formerly riparian upland property. However, since section 161.141 clearly identifies the MHWL–not the ECL–as the boundary between state and private upland ownership to the extent statutory accretions result from the beach restoration project, even in this ECL scenario the upland property remains in contact with the MHWL under section 161.141–whether or not the upland owner consented to the placement of sand on the upland property. Therefore, under this ECL scenario,

the result under section 161.141 is in direct conflict with the result under section 161.191(1).

If the state's judiciary ultimately determines that section 161.141 prevails in the last mentioned ECL scenario, the upland owner's lack of consent might give rise to an action for trespass damages and/or removal of the sand, but no taking occurs since the additional sand landward of the MHWL is still owned by the riparian upland owner under section 161.141 and the upland owner's property remains in contact with the MHWL.

The problem with Petitioner's claim to a judicial taking in this case is that the Florida Supreme Court, not being able to determine from the record where the ECL was located relative to the MHWL, could not address the issue as to how Petitioner's upland title and littoral rights were statutorily impacted by the

restoration project, although the Florida Supreme Court clearly stated that "fact" based, as-applied takings claims could be raised under the Act and Florida law.[25] Because of the inadequate record, it was impossible for the Florida Supreme Court to reconcile or harmonize the conflicting MHWL-based title to the additional sand deposited on the Petitioner's members' land under 161.141 with the potentially conflicting section 161.191(1) that could arguably sever contact of the upland with the MHWL by vesting the state with title to property landward of the ECL <u>if the ECL was located landward of the MHWL</u>—the only ECL scenario under section 161.191(1) that could give rise to a "takings" claim.

However, the issue as to whether, in any of these scenarios, the claimed right of contact with the MHWL

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[25] *Walton County*, 998 So. 2 at 1117, n.15

remains intact under section 161.141 or whether the claimed right of contact with the MHWL disappears under section 161.191(1) where the ECL is located landward of the MHWL is a matter that is still undecided under Florida law and a matter falling squarely within the interpretive powers of Florida's judiciary under theTenth Amendment. Unless and until a state court of last resort has a sufficient record to reconcile the conflict as to whether section 161.141 preserves the right of contact with the MHWL or section 161.191(1) affects a "taking" of the asserted right to contact with the MHWL in any specific ECL scenario described above, the Petitioner cannot establish a claim for the loss of littoral rights attached to the asserted right of contact with the MHWL.

Because, based upon the facts of record in this case, the Petitioner cannot establish a statutory taking

founded upon loss of contact with the MHWL, the judicial failure to force the eminent domain proceedings provided for in the Act does not give rise to a judicial taking.

II. The grant of a superior right of "statutory accretion" combined with the removal of the common law burden of erosion during the construction and maintenance of a beach restoration project does not give rise to a facial statutory taking requiring eminent domain proceedings enforceable by the judiciary. Therefore, there is no judicial taking.

Petitioner's claim that the Florida Supreme Court has changed state law by making accretion a future contingent interest in place of a vested right to future accretions amounts to an exercise in legal semantics because Petitioner ignores the substantive effect of the Act, which effectively suspends the common law littoral right of imperceptible accretion and substitutes a superior, immediate right to

"additions" of upland property landward of the MHWL so long as a beach restoration project is constructed and maintained. The reason for that substitution is evident. As long as the responsible government is pouring sand out upon renourished beaches to fulfill its statutory duty to maintain a restoration project, imperceptible common law accretion is literally and physically displaced by obvious and immediate sand deposits which attach to the upland ownership when located either landward of the MHWL, in accordance with section 161.141, Florida Statutes, or landward of the ECL, in accordance with section 161.191(1), Florida Statutes.

In relevant part, section 161.191(2)–the portion of the Act suspending the common law littoral right of accretion as a complement to the statutory accretion rights granted under sections 161.141–reads as follows:

> 161.191 Vesting of title to lands.—
>
> (2) Once the erosion control line along any segment of the shoreline has been established in accordance with the provisions of ss. 161.141-161.211, the common law shall no longer operate to increase...the proportions of any upland property lying landward of such line...by accretion...*except as provided in s. 161.211(2) and (3).* (Emphasis supplied).

Contrary to Petitioner's assertion, the net effect of the above-cited statute, read together with sections 161.211(2) and (3), Florida Statutes, is to suspend, not eliminate, the common law littoral right of accretion during an ongoing beach restoration project. The common law littoral right of accretion is held in abeyance as long as the project is completed and maintained. However, the statute provides what might be labeled a "statutory reverter" of the common law of accretion if the project is not maintained—a provision discussed next.

Section 161.211, Florida Statutes, imposes upon the state or other governmental entity with responsibility a duty to complete and maintain any approved beach restoration project. Under section 161.211(2), if the shoreline recedes landward of the erosion control line as a result of the failure to maintain the completed restoration project, the suspension of the common law of accretion provided for in section 161.191(2), Florida Statutes, ceases to be operative as to the affected upland. If the state does not respond to requests from riparian upland owners to restore the beach under such circumstances, the common law littoral right of accretion is reinstated by operation of section 161.211(3), Florida Statutes, and the ECL becomes void. Together, these statutes work to suspend the littoral right of accretion without the elimination of that right asserted by the Petitioner at

page 30 of Petitioner's brief, for suspension lasts only as long as the state or local governments charged with maintaining the restoration project diligently perform that duty.

Petitioner also conveniently ignores the other effect of these same two statutes—the suspension of the common law burden of erosion on riparian upland owners which, as the Florida Supreme Court aptly pointed out, quoting from Blackstone, *2 Commentaries on the Laws of England,* "is that the owner of the [upland] loses title to land that is lost by erosion." One of the policy reasons traditionally cited as a basis for the common law rule establishing the littoral right of accretion is the countervailing burden of erosion. As the Florida Supreme Court recognized in *Thiesen v. Gulf F. & A. Ry. Co.*, 75 Fla. 28, 78 So. 491 (1917)

> By some, the rule has been vindicated on the principle of natural justice, that he

> who sustains the burden of losses and of repairs, imposed by the contiguity of waters, ought to receive whatever benefits they may bring by accretion . . .

Thiesen 75 Fla. at 46.

The reason for the common law rule of accretion—the burden of erosion upon the upland owner—is therefore eliminated by the above-cited provisions of the Act. At the same time, sections 161.141 and 161.191(2) operate to grant superior rights of "statutory accretion", especially where the ECL is located seaward of the MHWL. In addition, section 161.201 preserves all other common law littoral rights in the riparian upland owner. Again, there is not a taking of the common law right of accretion but a grant of enhanced statutory property rights which supplant common law accretion, subject to a statutory reverter to common law accretion and erosion if the government fails to complete or maintain a beach restoration

project. Consequently, there is no requirement for the institution of eminent domain proceedings and no judicial taking for failing to require such proceedings.

CONCLUSION

For the reasons stated above, the Petition should be denied.

Respectfully submitted,

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161.141 Property rights of state and private upland owners in beach restoration project areas.—The Legislature declares that it is the public policy of the state to cause to be fixed and determined, pursuant to beach restoration, beach nourishment, and erosion control projects, the boundary line between sovereignty lands of the state bordering on the Atlantic Ocean, the Gulf of Mexico, or the Straits of Florida, and the bays, lagoons, and other tidal reaches thereof, and the upland properties adjacent thereto; except that such boundary line shall not be fixed for beach restoration projects that result from inlet or navigation channel maintenance dredging projects unless such projects involve the construction of authorized beach restoration projects. However, prior to construction of such a beach restoration project, the board of trustees must establish the line of mean high water for the area to be restored; and any additions to the upland property landward of the established line of mean high water which result from the restoration project remain the property of the upland owner subject to all governmental regulations and are not to be used to justify increased density or the relocation of the coastal construction control line as may be in effect for such upland property. The resulting additions to upland property are also subject to a public easement for traditional uses of the sandy beach consistent with uses that would have been allowed prior to the need for the restoration project. It is further declared that there is no intention on the part of the state to extend its claims to lands not already held by it or to deprive any upland or submerged land owner of the legitimate and constitutional use and enjoyment of his or her property. If an authorized beach restoration, beach

nourishment, and erosion control project cannot reasonably be accomplished without the taking of private property, the taking must be made by the requesting authority by eminent domain proceedings. In any action alleging a taking of all or part of a property or property right as a result of a beach restoration project, in determining whether such taking has occurred or the value of any damage alleged with respect to the owner's remaining upland property adjoining the beach restoration project, the enhancement, if any, in value of the owner's remaining adjoining property of the upland property owner by reason of the beach restoration project shall be considered. If a taking is judicially determined to have occurred as a result of a beach restoration project, the enhancement in value to the owner's remaining adjoining property by reason of the beach restoration project shall be offset against the value of the damage, if any, resulting to such remaining adjoining property of the upland property owner by reason of the beach restoration project, but such enhancement in the value shall not be offset against the value of the property or property right alleged to have been taken. If the enhancement in value shall exceed the value of the damage, if any, to the remaining adjoining property, there shall be no recovery over against the property owner for such excess.

161.161 Procedure for approval of projects.—
(5) The board of trustees shall approve or disapprove the erosion control line for a beach restoration project. In locating said line, the board of trustees shall be guided by the existing line of mean high water, bearing in mind the requirements of proper engineering in the beach restoration project, the extent to which erosion or avulsion has occurred, and the need to protect existing ownership of as much upland as is reasonably possible.

161.191 Vesting of title to lands.—
(1) Upon the filing of a copy of the board of trustees' resolution and the recording of the survey showing the location of the erosion control line and the area of beach to be protected as provided in s. 161.181, title to all lands seaward of the erosion control line shall be deemed to be vested in the state by right of its sovereignty, and title to all lands landward of such line shall be vested in the riparian upland owners whose lands either abut the erosion control line or would have abutted the line if it had been located directly on the line of mean high water on the date the board of trustees' survey was recorded.
(2) Once the erosion control line along any segment of the shoreline has been established in accordance with the provisions of ss. 161.141-161.211, the common law shall no longer operate to increase or decrease the proportions of any upland property lying landward of such line, either by accretion or erosion or by any other natural or artificial process, except as provided in s. 161.211(2) and (3). However, the state shall not extend, or permit to be extended through artificial means, that

portion of the protected beach lying seaward of the erosion control line beyond the limits set forth in the survey recorded by the board of trustees unless the state first obtains the written consent of all riparian upland owners whose view or access to the water's edge would be altered or impaired.

161.201 Preservation of common-law rights.—Any upland owner or lessee who by operation of ss. 161.141-161.211 ceases to be a holder of title to the mean high-water line shall, nonetheless, continue to be entitled to all common-law riparian rights except as otherwise provided in s. 161.191(2), including but not limited to rights of ingress, egress, view, boating, bathing, and fishing. In addition the state shall not allow any structure to be erected upon lands created, either naturally or artificially, seaward of any erosion control line fixed in accordance with the provisions of ss. 161.141-161.211, except such structures required for the prevention of erosion. Neither shall such use be permitted by the state as may be injurious to the person, business, or property of the upland owner or lessee; and the several municipalities, counties and special districts are authorized and directed to enforce this provision through the exercise of their respective police powers.

161.211 Cancellation of resolution for nonperformance by board of trustees.—
(1) If for any reason construction of the beach erosion control project authorized by the board of trustees is not commenced within 2 years from the date of the recording of the board of trustees' survey, as provided in s. 161.181, or in the event construction is

commenced but halted for a period exceeding 6 months from commencement, then, upon receipt of a written petition signed by those owners or lessees of a majority of the lineal feet of riparian property which either abuts or would have abutted the erosion control line if the same had been located at the line of mean high water on the date the board of trustees' survey was recorded, the board of trustees shall forthwith cause to be canceled and vacated of record the resolution authorizing the beach erosion control project and the survey locating the erosion control line, and the erosion control line shall be null and void and of no further force or effect.

(2) If the state, county, municipality, erosion control district, or other governmental agency charged with the responsibility of maintaining the protected beach fails to maintain the same and as a result thereof the shoreline gradually recedes to a point or points landward of the erosion control line as established herein, the provisions of s. 161.191(2) shall cease to be operative as to the affected upland.

(3) In the event a substantial portion of the shoreline encompassed within the erosion control project recedes landward of the erosion control line, the board of trustees, on its own initiative, may direct or request, or, upon receipt of a written petition signed by the owners or lessees of a majority of the lineal feet of riparian property lying within the erosion control project, shall direct or request, the agency charged with the responsibility of maintaining the beach to restore the same to the extent provided for in the board of trustees' recorded survey. If the beach is not restored as directed or requested by the board of trustees within a period of 1 year from the date of the directive or

request, the board of trustees shall forthwith cause to be canceled and vacated of record the resolution authorizing the beach erosion control project and the survey locating the erosion control line, and the erosion control line shall be null and void and of no further force or effect.

AMICUS CURIAE BRIEF

No. 08-1151

SUPREME COURT U.S.
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Supreme Court of the United States

STOP THE BEACH RENOURISHMENT, INC.,

Petitioner,

v.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, et al.,

Respondents.

On Writ Of Certiorari To The Florida Supreme Court

BRIEF FOR THE STATES OF CALIFORNIA, ARKANSAS, DELAWARE, ILLINOIS, IOWA, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, OHIO, OREGON, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, VIRGINIA, WASHINGTON, WEST VIRGINIA AND WYOMING, AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF THE STATES

As sovereigns within our federal system, the States are empowered to articulate and develop their property laws. The States therefore establish property laws (*Phillips v. Washington Legal Found.*, 524 U.S. 156, 164 (1998)) and may adapt them as necessary to address changing conditions. See *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 379 (1977).

Petitioner, however, is proposing an ill-conceived new doctrine that would undermine the States' well established and traditional authority to determine the scope of their own property laws. It would do this by expanding takings law to subject state court property law determinations to federal review. Specifically, petitioner would encourage dissatisfied litigants to argue that a state court has taken property without payment of just compensation because it has issued a decision that purportedly departs from prior holdings. This would subject state court property laws to unwarranted and unprecedented review by the federal judiciary. Further, it could subject a wide range of state court decisions to such scrutiny, including decisions concerning:

- Corporate asset distributions
- Marital property allocations
- Inheritance rules
- Employee rights
- The scope and location of easements

- Vested rights involving licenses
- Franchise rights

The States have a strong interest in preserving their authority to determine and shape their own property laws without federal review. The States represented here therefore respectfully request that this Court reject petitioner's proposed doctrine and adhere to its numerous decisions acknowledging that state courts have the paramount power to determine and interpret their property laws.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 542 (2005), this Court provided much needed clarity by disentangling the Takings Clause from the Due Process Clause of the United States Constitution. This turned an area of the law that Justice Kennedy characterized as "perplexing" (*Eastern Enterprises v. Apfel*, 524 U.S. 498, 541 (1998) (Kennedy, J., concurring and dissenting)) into one that is now more coherent as a doctrine and more workable in practice. Petitioner would frustrate this newly found clarity by creating a novel, confusing "judicial takings" doctrine. It asks this Court to create an "ad-hoc test" under which a judicial decision amounts to a taking if it "suddenly and dramatically" changes state property law in an "unpredictable" manner. Pet. Br. 48, 50.

In this brief, the States first will explain why a judicial takings doctrine would reverse this Court's longstanding affirmation that, under our nation's federal structure, the sovereign States determine their own property laws. That dramatic change would ignore the special ability of state courts to develop rules of property grounded in the individual State's unique history and physical landscape.

Moreover, in addition to requiring a fundamental alteration in how the courts develop and review state property laws, petitioner's argument could have major practical consequences. Only this Court could hear judicial takings claims against state courts because various jurisprudential doctrines would preclude their review in the lower federal courts. This Court could therefore be flooded with petitions seeking its review of state court decisions touching a wide range of property issues, without a realistic ability to entertain more than a handful of these disputes or to perform the fact-finding that takings claims inevitably entail.

Next the States will outline why applying takings review to federal judicial decisions – an outcome that petitioner's argument compels – is also inappropriate. Because the Fifth Amendment's Takings Clause applies equally to the federal government, petitioner's new doctrine would lead to the logical and equally untenable conclusion that a federal court's reconsideration of its prior property law decisions, which occurred in cases such as *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, *supra*, 429 U.S.

363, might be deemed takings. It could also inundate the Court of Federal Claims with "judicial takings" claims against other federal courts. See, *e.g.*, *Brace v. United States*, 72 Fed. Cl. 337, 359 (2006). Although petitioner asserts that its new ad hoc test would mitigate this impact (Pet. Br. 48, 50), it would generate additional litigation, as parties dispute whether the new amorphous takings test applies to their factual circumstances.

All of these concerns call for the rejection of a highly intrusive and unworkable judicial takings doctrine.

ARGUMENT

I. BOTH CONSTITUTIONAL AND PRACTICAL CONSIDERATIONS PRECLUDE THE APPLICATION OF A JUDICIAL TAKINGS DOCTRINE TO STATE COURT DECISIONS

Our Founding Fathers recognized that "[t]he powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement, and prosperity of the State." *The Federalist No. 45*, at 292-93 (Clinton Rossiter ed., 1961). They affirmed the States' role in both the Tenth Amendment to the

United States Constitution,[1] and in the Constitution's Guarantee Clause, under which the United States must "guarantee to every State in this Union a Republican Form of Government." U.S. Const., Art. IV, § 4. This Court's decisions therefore respect the role of the States in declaring and interpreting their law, and acting as laboratories for the development of new approaches to new problems. *Chandler v. Florida*, 449 U.S. 560, 579-80 (1981), favorably citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Ignoring the States' sovereignty, petitioner asks this Court to enunciate a new takings rule that would not only authorize federal judicial review of state real property law decisions but also a wide range of other state court decisions interpreting state laws.

Since the States ratified the Fifth Amendment in 1791, however, this Court has never held that a court can be subject to a claim for just compensation under the Takings Clause. Moreover, no party or amici has pointed to any hint that the Founders' original understanding of that amendment included the concept that the States could be required to pay compensation for their courts' decisions. For over two centuries, this nation has not had nor needed a

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[1] The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

judicial takings doctrine. For federalism, doctrinal, and pragmatic reasons, this Court should reject petitioner's invitation to create this novel doctrine.

A. This Court Has Long Recognized That In Our Federal System, The States And Their Courts Decide Matters Of Property Law

The Fifth Amendment "protects rather than creates property interests." *Phillips v. Washington Legal Found.*, 524 U.S. at 164. In our nation, those interests are created and defined by each individual State. This fundamental aspect of the constitutional structure was underscored in *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. at 378, where Justice Rehnquist, writing for the majority, stated that "[u]nder our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States." Justice Rehnquist emphasized this point by quoting *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 155 (1944): "'The great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state.'" *Corvalis* at 378. As a result of this core principle, for over a century this Court has affirmed the authority of state courts to interpret property laws without offending the Takings Clause.

This is seen, for example, in *Sauer v. City of New York,* 206 U.S. 536 (1907). There, the City built a viaduct over a street that impaired a landowner's access to his land, as well as his access to light and air. The owner sued, but New York's highest court denied relief on the ground that, under New York law, he had no easements of access, light, or air that could restrict street improvements. This Court then heard the owner's claim that the City, in building the viaduct, denied him due process by taking his property without compensation. *Id.* at 547. The Court rejected the claim. It reasoned that various state court decisions concerning this issue "have been conflicting, and often in the same State irreconcilable in principle. *The courts have modified or overruled their own decisions. . . .*" *Id.* at 548 (emphasis added). This Court made it clear, however, that this is a matter for the States, not the federal judiciary, to decide. "Surely such questions must be for the final determination of the state court." *Ibid.*

The Court's reasoning in *Sauer* essentially adopted the dissent of Justice Holmes in a case decided two years earlier. In *Muhlker v. New York & Harlem R.R. Co.,* 197 U.S. 544 (1905), a four-Justice plurality concluded that a state court violated the Contract Clause of the United States Constitution when it held that a railroad could deprive property owners of light and air easements by elevating its tracks. However, Justice Holmes issued a dissent that three other justices joined. He stressed that "I know of no constitutional principle to prevent the complete

reversal of the elevated railroad cases tomorrow, if it should seem proper to the [New York] Court of Appeals." *Id.* at 574 (Holmes, J., dissenting). Then, focusing on the property owner's takings claim, Justice Holmes explained that "Plaintiff's rights, however expressed, are wholly a construction of the courts. I cannot believe that . . . we are free to go behind the local decisions on a matter of land law. . . ." *Id.* at 575-76.

In *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 450 (1924), the Court again followed the reasoning of Justice Holmes and reaffirmed the right of state courts to modify or even overrule their prior property law decisions without violating the Constitution (in that case, due process requirements). The *Tidal Oil* litigants disputed who owned two tracts of land. When the case reached this Court, Tidal Oil Company alleged that the Oklahoma Supreme Court had changed its prior rulings concerning the sale of a minor's property in such a manner that deprived the company of its due process right to the property. *Id.* at 449. This Court rejected the argument. Citing a string of prior Supreme Court decisions, the Court in *Tidal Oil* reiterated that "the mere fact that the state court reversed a former decision to the prejudice of one party does not take away his property without due process of law." *Id.* at 450.

This Court once more affirmed that the federal courts should not second-guess state court property law decisions in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930). In *Brinkerhoff-Faris*

the Court explained that courts administering the common law have the right to alter prior decisions "to conform with changing ideas and conditions . . . without offending constitutional guaranties, even though the parties may have acted to their prejudice on the faith of the earlier decisions." *Id.* at 681, n.8.

The Court reiterated this point in *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932). In that case, the Montana Supreme Court overruled a prior holding concerning the right of parties to recover freight overcharges. A question before the Court was whether the Takings Clause prevented the state court from only applying its new rule prospectively. Writing for the Court, Justice Cardozo explained that it was up to the state court: "the Federal Constitution has no voice on the subject." *Id.* at 364. Whether the new decision is based on the common law or on statute, a state court has the option of applying the prior law to past activities, or "[o]n the other hand, it may hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning." *Id.* at 364-65.

More recently, in *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, the Court underscored the paramount power of state courts (and even legislatures) in determining state property rights. In that case, the Court decided whether state

or federal law governed property ownership disputes between the State and a private landowner where a navigable river changed its location in a sudden and perceptible (avulsive) manner. In explaining why state law should apply, the Court relied on *Barney v. Keokuk*, 94 U.S. 324 (1877). It stated that in *Barney*, "the Court clearly articulated the rule that the States could formulate, and modify, rules of riparian ownership as they saw fit." *Corvallis*, 429 U.S. at 379. It characterized this and related holdings as articulating "correct principles" that should apply to both tidal and non-tidal waters. *Ibid.*

Two cases corroborate the States' paramount role in determining state property law, while indicating that this Court would only consider reviewing those determinations under extraordinary circumstances: *Fox River Paper Co. v. Railroad Comm'n*, 274 U.S. 651, 657 (1927) and *Broad River Power Co. v. South Carolina*, 281 U.S. 537, 540 (1930). The Court in *Fox River* reviewed whether a law requiring dam operators to allow the State to acquire the dam after thirty years violated "the rights vested in riparian owners" to use water power, and therefore amounted to "a taking of property without due process." *Fox River*, 274 U.S. at 652-54. The state court had rejected that claim, determining that the riparian owner's right was subordinate to that of the State to control its navigable waters, and that the State could prohibit the dam, or permit it with restrictions such as this condition. *Id.* at 654. This Court upheld the state decision, reiterating the need to defer to state

court determinations of state law: "We are not concerned with the correctness of the rule adopted by the state court, *its conformity to authority*, or its consistency with related legal doctrine." *Id.* at 657 (emphasis added).

The Court went on to say that it is for the state courts "to define rights in land located within the state, and the *Fourteenth Amendment*, in the absence of an attempt to forestall our review of the constitutional question, affords no protection to supposed rights of property which the state courts determine to be non-existent." *Id.* at 657 (emphasis in original).

In *Broad River Power Co. v. South Carolina*, 281 U.S. at 540, this Court reiterated *Fox River's* observations, explaining that, so long as there is no "evasion of the constitutional issue," the Court will uphold the state court decision. The Court "will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule, for that of the state court." *Id.* at 541.

These early cases affirm that, absent extreme circumstances, this Court should not review state court property law determinations.[2] They do not

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[2] Any review needs to be limited to particularly extraordinary situations. In contrast to most constitutional rights that are federally created and that exist independently of any state law, the Fifth Amendment's property protections are necessarily bound up with a State's definition of property. The federalism reasons outlined in this brief for rejecting a judicial

(Continued on following page)

support the creation of a "judicial takings" rule authorizing the highly intrusive federal review of state property laws that petitioner seeks. To the contrary, like the numerous other decisions reviewed

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takings doctrine therefore also call for a very high threshold before this Court reviews a state judicial determination concerning a State's property law.

The States represented here therefore suggest that this Court utilize a highly deferential standard such as the one used in substantive due process cases. See *Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252, 2265 (2009) ("'shocks the conscience'") (citation omitted); *United Artists Theatre Circuit, Inc. v. Twp. of Warrington*, 316 F.3d 392, 402 (3d Cir. 2003) (same). *Cf. Rogers v. Tennessee*, 532 U.S. 451, 462 (2001) ("a judicial alteration of a common law doctrine of criminal law violates the principle of fair warning, and hence must not be given retroactive effect, only where it is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.") (internal quotation marks and citation omitted). In the extraordinary, hypothetical event that a state court redefined property in an objectively indefensible attempt to evade a takings claim, this Court may be required to evaluate the proper interpretation of state law that should have been applied. In that very rare circumstance, the state court would effectively be failing to review a federal claim as required by the Supremacy Clause and this Court could utilize its appellate authority to direct the state court to interpret state property law correctly. See, *e.g.*, Laura S. Fitzgerald, *Suspecting the States: Supreme Court Review of State-Court State-Law Judgments*, 101 Mich. L. Rev. 80, 171 (2002). That would not, of course, amount to a judicial taking or other constitutional violation. Rather, just as an appellate court's alteration of a lower court decision does not create a cause of action against the lower court, this Court's ruling would not create a judicial taking or any other type of claim against the state court.

in this section of the brief, they call for a rejection of petitioner's new, officious takings test.

B. State Courts Are Best Situated To Decide Matters Of State Law

Aside from stare decisis, the policy reasons underlying the cases outlined above call for rejecting petitioner's judicial takings doctrine. The cases not only respect the federal structure of our nation. They also recognize that state property laws are best understood by the state courts that administer those laws.

For example, as recently as last year, this Court affirmed that it is up to the States to establish the property rights of riparian owners. See *State of New Jersey v. State of Delaware*, 128 S.Ct. 1410, 1422 (2008); see also *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. at 378-79. There are good reasons why our federal system demands that this division of power should stay that way. The development of state boundary law is complex, nuanced and intensely factual, and it reflects each individual State's historic values and policy preferences.

Take the accretion doctrine, upon which the petitioner bases its claim that it has an inherent right to future increases in land adjoining its property. The common law has never guaranteed that newly added land belongs to riparian owners. The common law is riddled with a variety of situations in which the

courts have refused to apply the accretion doctrine and have denied riparian owners the benefit of additions to new shoreline property. See, *e.g.*, *Arkansas v. Tennessee*, 246 U.S. 158, 174-75 (1918) ("reemergence" doctrine); *Philadelphia Co. v. Stimson*, 223 U.S. 605 (1912) ("avulsion" doctrine); *DeBoer v. United States*, 653 F.2d 1313, 1315 (9th Cir. 1981) ("substantial accretion" exception to accretion doctrine); *Carpenter v. City of Santa Monica*, 147 P.2d 964 (Cal.App. 1944) ("artificial accretion" doctrine); *Martin v. Busch*, 112 So. 274, 287 (Fla. 1927) (drainage and reclamation exception); *State v. George C. Stafford & Sons, Inc.*, 105 A.2d 569, 574 (N.H. 1954) (denying upland owners benefit of additions they caused); *State v. Longyear Holding Co.*, 29 N.W.2d 657, 667 (Minn. 1947) (limiting reliction doctrine to permanent changes); *Weinberger v. Passaic*, 86 Atl. 59, 60 (N.J. 1913) (filled land exception).

The Court recognized this divergence and complexity of state laws concerning riparian property rights and boundaries more than a century ago. In *Shively v. Bowlby*, 152 U.S. 1, 26 (1874), the Court explained that "each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy. . . ." As a result, "[g]reat caution . . . is necessary in applying [riparian property right] precedents in one state to cases arising in another." *Ibid.*

These divergent approaches highlight the nature of the common law: (1) each State develops its own set of property rules based on policy choices and

physical conditions unique to that State; (2) application of state boundary rules such as accretion and erosion is inherently flexible because state courts constantly encounter unanticipated, complex factual situations and must adapt their common law and statutory rules in a way that makes sense and that is faithful to past precedent; (3) because the States' common law property rules necessarily develop from one case to the next, it is rare that a state court decision abruptly departs from "settled" law because application of these rules is rarely settled.[3]

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[3] This case exemplifies how unsettled riparian boundary law has been. As far back as 1917, the Florida Supreme Court suggested that property owners' littoral rights are subject to the right of the State to fill its submerged waters. In *Thiesen v. Gulf, Florida & Alabama Co.*, 78 So. 491 (1917), the court held that the railroad before it was liable for damaging an upland owner's littoral rights, including the owner's right to accretion, stressing the fact that the railroad was "private." *Id.* at 507. In contrast, the court explained that had the *State* constructed the same structures, "as the owner of the submerged land," it would not be liable. *Ibid.* Moreover, in a setting similar to the one before this Court, the Florida Supreme Court held that under the law concerning "a common enemy," where a statute authorized a municipality to build seawalls and other structures to protect public lands from the "danger of destruction because of action of the sea," a private upland owner had no right to damages even though the structures caused his land to "excessively wash away." *B.F. Paty v. Town of Palm Beach*, 158 Fla. 575, 576-77 (1947). On the other hand, in *Webb v. Giddens*, 82 So.2d 743 (Fla. 1955), the court found that fill for a highway improperly impaired an upland owner's right of access to a lake. In doing so, however, the Florida Supreme Court expressly recognized the unsettled nature of riparian rights. It explained that these property rights "have been broadly and inexactly stated," and

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This Court has even recognized this dynamic nature of the common law in the criminal law context, where the consequences of any alteration can be particularly severe. In *Rogers v. Tennessee*, *supra*, 532 U.S. 451, the petitioner stabbed an individual, who died 15 months later. The state court then convicted the petitioner of murder. Under the State's "year and a day" common law rule, however, no person could be convicted of murder unless the victim died within a year and a day of the act. The Tennessee Supreme Court nevertheless upheld the conviction. It did so by abolishing the common law rule, finding that "the original reasons for recognizing the rule no longer exist." *Id.* at 455. This Court affirmed.

In affirming, the Court explained that "our case law system" contains "divergent pulls of flexibility and precedent." *Id.* at 461 (internal quotation marks and citation omitted). As such, strict "limitations on judicial decisionmaking would place an unworkable and unacceptable restraint on normal judicial processes and would be incompatible with the resolution of uncertainty that marks any evolving legal system." *Id.* at 461. The Court reasoned that this is especially so "[i]n the context of common law doctrines," where "there often arises a need to clarify or even to reevaluate prior opinions as new

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that this is a "field of law which is unusually dependent upon the facts and circumstances of each case." *Id.* at 745.

circumstances and fact patterns present themselves." *Ibid.*

The proposed judicial takings doctrine, however, ignores this essential element of the common law. It similarly fails to respect the special authority of state courts to interpret their own property laws by drawing upon their experience with the State's laws, history, physical environment, commercial activities, social mores and other relevant factors. For many years, the Court has deferred to state decisions concerning state property laws. The petitioner is now seeking to reverse that history and to have the federal judiciary second-guess the delicate balancing that state courts must engage in to resolve these property issues. The Takings Clause should not be expanded to encompass such an intrusive doctrine.

C. This Court Alone Would Have Jurisdiction To Hear Takings Claims Against State Courts

1. The Eleventh Amendment, judicial immunity and the *Rooker-Feldman* doctrine each prevent lower federal courts from hearing takings claims against state courts

When government "takes" property, it is required to pay compensation. The Takings Clause does not prohibit improper acts, but rather mandates compensation for proper acts. As this Court explained in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. at 543, the

provision "does not bar government from interfering with property rights, but rather requires compensation 'in the event of *otherwise proper interference* amounting to a taking.'" (quoting *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987)) (emphasis added in *Lingle*).

The Eleventh Amendment, however, bars federal courts from hearing damage claims against the States. See, *e.g.*, *Alden v. Maine*, 527 U.S. 706, 747, 765 (1999).[4] This immunity reflects the "vital role reserved to the States by the constitutional design." *Id.* at 713. Federal courts from around the country therefore consistently apply the Eleventh Amendment to takings claims brought against the States.[5]

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[4] See also *Lake Country Estates v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 410 (1979) (because it is not a state entity, the Tahoe Regional Planning Agency does not enjoy immunity from federal court takings actions); *Webster v. Doe*, 486 U.S. 592, 613 (1988) (Scalia, J., dissenting) (explaining, by using the right to just compensation as an example, that "[t]he doctrine of sovereign immunity – not repealed by the Constitution, but to the contrary at least partly reaffirmed as to the States by the Eleventh Amendment – is a monument to the principle that some constitutional claims can go unheard.").

[5] *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 956 (9th Cir. 2008); *DLX, Inc. v. Kentucky*, 381 F.3d 511, 526 (6th Cir. 2004); *State Contracting and Engineering Corp. v. State of Florida*, 258 F.3d 1329, 1338 (Fed. Cir. 2001); *Harbert Int'l, Inc. v. James*, 157 F.3d 1271, 1277 (11th Cir. 1998); *Washington Legal Found. v. Texas Equal Access to Justice Found.*, 94 F.3d 996, 1005 (5th Cir. 1996), rev'd on other grounds sub nom. *Phillips v. Washington Legal Found.*, *supra*, 524 U.S. 156;

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As a result of this bar, the only federal court that could entertain a judicial takings claim against a state court would be this Court, as the Eleventh Amendment does not constrain its appellate jurisdiction over state court decisions. See *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U.S. 18, 31 (1990).

Moreover, aside from Eleventh Amendment immunity, judicial immunity would bar a suit against a state court and its judges for the very relief provided by the Takings Clause, that is, monetary relief. As this Court has explained, "[a] long line of this Court's precedents acknowledges that, generally, a judge is immune from a suit for money damages." *Mireles v. Waco*, 502 U.S. 9 (1991) (per curiam) (citations omitted); see also *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978) (state judge immune from suit seeking damages for forced sterilization).[6]

Finally, federal district court review of state court decisions would be prohibited under the *Rooker-Feldman* doctrine. Under that doctrine, United States district courts lack subject matter jurisdiction over challenges to final state court decisions. *District of*

Citadel Corp. v. Puerto Rico Highway Auth., 695 F.2d 31, 33 n.4 (1st Cir. 1982); *Garrett v. Illinois*, 612 F.2d 1038, 1039 (7th Cir. 1980).

[6] Suits for injunctive relief are sometimes allowed but only where "a declaratory decree was violated or declaratory relief was unavailable." See 42 U.S.C. § 1983; *Roth v. King*, 449 F.3d 1272, 1286 (D.C.Cir. 2006).

Columbia Court of Appeals v. Feldman, 460 U.S. 462, 486 (1983); *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 283-84 (2005). The doctrine applies even if the challenge alleges that the state court action was unconstitutional. *Feldman* at 486; *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923). Under the *Rooker-Feldman* doctrine, while parties may appeal a state court decision to the State's highest court, and then to this Court if a federal constitutional question is presented, "horizontal" review of a state court decision in federal court is unavailable. *Rooker*, 263 U.S. at 416.

Thus, if this Court establishes a "judicial takings" doctrine, it would be the only federal body that is able to apply that doctrine to a state court decision. For this reason, and for the reasons discussed below, establishment of such a doctrine would be unwise and impracticable.

2. This Court could be flooded with petitions that would require it to resolve disputed facts

If the Court creates a judicial takings doctrine, any party asserting that a state court adopted or affirmed a rule of property that is allegedly inconsistent with prior law may claim that its property was taken. This new concept would not be limited to disputes between governments and private parties; it would also apply to a wide variety of controversies between private parties. Disgruntled heirs could

assert that they were denied property to which they were allegedly entitled under prior judicial holdings or legislative acts. Similar assertions would be raised by spouses in marital controversies; shareholders in corporate disputes or dissolutions; real property owners in boundary, easement, and other disputes; employees in controversies over labor conditions or employment terms; insured individuals and corporations in disputes over insurance coverage claims, and so on. To bring themselves within the rubric of a judicial takings claim, advocates would have little hesitation characterizing unfavorable state court decisions as "novel," "extraordinary," or "unprecedented" alterations of their clients' property rights.

Moreover, many judicial takings claims would not come to the Court with an adequate factual record to adjudicate a taking claim. If a litigant successfully petitioned this Court for certiorari on the ground that the state court committed a judicial taking, the Court would need to determine whether a taking occurred and, if so, the amount of damages. A state might argue in its defense that its action was not a taking under *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), requiring a comprehensive trial, so that the parties could present evidence on economic impact and the other fact-specific *Penn Central* factors. See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. at 538-39. This Court is not equipped to conduct evidentiary trials on the existence of a taking and the amount of damages.

Further, the nature of a judicial taking likely precludes the Court from directing a lower court to address factual questions on remand, as it might otherwise do. In a judicial taking case against a state court, remand would be to the very state judicial system that allegedly must compensate the party for the taking. As a result, state courts would presumably be precluded from hearing the case. See *Caperton v. A. T. Massey Coal Co.*, 129 S.Ct. at 2259. As a practical matter, this Court would therefore either reject virtually all petitions claiming a judicial taking or be forced to appoint Special Masters to hear these claims.

Petitioner's new doctrine would therefore create an untenable situation that would burden the Court to the neglect of its other responsibilities. *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 504 (1971). Thus, subjecting state courts to judicial takings claims is impracticable as well as counter to this Court's consistent recognition of the States' role in determining their own property laws.

II. APPLYING A JUDICIAL TAKINGS CONCEPT TO FEDERAL COURT DECISIONS IS JUST AS INAPPROPRIATE

The doctrinal and practical problems with a judicial takings concept do not end with its application to state courts. Applying it to federal courts is just as troubling.

A. A Judicial Takings Doctrine Would Logically Apply To Federal Courts

Petitioner asserts that a state court should be deemed to commit a judicial taking when the court's decision fails to meet petitioner's proposed new ad hoc test. Pet. Br. 48. Under that test, a judicial decision amounts to a taking if it "suddenly and dramatically" changes state property law in an "unpredictable" manner. *Id.* at 50. Although petitioner's articulation of its test limits it to state court decisions, logically it would also apply to federal court decisions, including this Court's opinions, as the Takings Clause applies to federal actions. See *Preseault v. Interstate Commerce Commission*, 494 U.S. 1, 11-12 (1990). The implications for the federal judiciary would be profound.

Just as "common law systems need flexibility" (Pet. Br. 48), this Court has faced new circumstances calling for it to reexamine long-established property laws. It has therefore reached decisions that petitioner would apparently characterize as judicial takings, including at least two that concern the same type of property interests involved in this action: assertions of title to lands beneath navigable waters.

For the first "two generations" of our nation's existence, courts in the United States followed the English rule under which the sovereign owned the beds of tidal waters, while the nontidal rivers of England could be privately owned. See *Barney v. Keokuk*, 94 U.S. 324, 338 (1877) (discussing

development of sovereign ownership rule). This rule made sense in a relatively small country whose rivers became largely unnavigable beyond the reach of the tide. But it made no sense in the United States, where large navigable freshwater rivers and lakes were the principal highways of commerce. As a result, this Court saw that the circumstances of this new land required that rivers which would have been considered proprietary in England should be recognized as navigable and subject to sovereign ownership in the United States.

Consequently, as the *Barney* Court observed, this Court overruled years of precedent in *Genessee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851), to hold that non-tidal waters may be navigable for commerce clause purposes. *Barney*, 94 U.S. at 338. As a result, lands that were free of any easements before *Genessee Chief* became subject to a dominant federal navigable servitude that enables the government to construct channels and similar navigational improvements without compensating landowners. See *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 701 (1987). Moreover, as explained in *Barney*, the change meant that "it would now be safe" for States to decide that title itself in these non-tidal waters turned on whether they were navigable for commerce clause purposes. *Ibid.* Thus, in addition to becoming subject to a federal servitude, in many cases lands that may have been deemed private just after the American Revolution became sovereign public lands "two generations" later following this Court's eventual

adaptation of the common law to the needs of the New World. *Ibid.*

This Court has also revised its choice of law on riparian boundaries to the detriment of landowners. "[F]rom 1845 until 1973," the Court let the States apply their own boundary laws in determining the private ownership of land along a State's navigable waters when the location of the waters shifted. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. at 382. Then, in *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973), the Court held that, for States admitted after the original 13 States, federal common law determined ownership in these disputes between the States and private property owners. *Corvallis*, 429 U.S. at 369-70.[7] That changed property ownership around the country, because, as illustrated by the Oregon and Arizona laws reviewed in *Corvallis* and *Bonelli*, state laws governing boundary movements often differ from federal law. Three years later, the Court changed title rights again by overruling *Bonelli*. See *Corvallis*, 429 U.S. at 382.[8]

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[7] Arguably, the Court started to alter the law six years earlier, when it ruled in *Hughes v. Washington*, 389 U.S. 290 (1967), that federal law applied to boundary movements involving private ocean-front property held under a federal patent. See discussion in *Corvallis* at 377, n.6.

[8] This Court has similarly revised property law concerning navigable air space. In *United States v. Causby*, 328 U.S. 256, 260-61 (1946), the Court determined that "[i]t is ancient doctrine that at common law ownership of the land extended to the

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Under petitioner's judicial takings theory, litigants could claim that those decisions, and untold others, amounted to temporary or permanent judicial takings. For example, like the amici in *Corvallis*, petitioner could assert that *Bonelli* "represented a sharp break with well-established previous decisions of the Court." See *Corvallis*, 429 U.S. at 368. This Court's decisions in those cases represented a far more drastic break with the law than anything supposedly undertaken by the Florida Supreme Court in this case. But none of this Court's property decisions are judicial takings; they were efforts of the Court to adapt ancient rules to a modern world. That is the hallmark of what state courts do when asked to apply their common law rules in new factual settings.

This Court should not be subject to petitioner's new doctrine. As will be seen, it would also be inappropriate to apply this doctrine to lower federal courts.

B. A Judicial Takings Doctrine Could Overwhelm The Court Of Federal Claims By Requiring It To Review Countless Decisions Of Other Federal Courts

If this Court establishes a judicial takings doctrine, the Court of Federal Claims could become inundated with lawsuits, as disgruntled parties freely

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periphery of the universe. . . . But that doctrine has no place in the modern world."

assert that the lower federal courts – or even appellate courts – took their property by abruptly departing from past precedent. *Brace v. United States*, *supra*, 72 Fed. Cl. 337, highlights this problem. In *Brace*, a litigant brought suit in the Court of Federal Claims seeking compensation because an order of a federal district court had allegedly taken his property. The Court of Federal Claims, however, rejected the argument that a takings claim arises where a state or federal court overrules doctrines established by prior decisions that the litigant relied on. In addition to citing numerous holdings of this Court and of lower courts, *Brace* explained that "were the court to accept plaintiff's syllogism, it would constantly be called upon by disappointed litigants to act as a super appellate tribunal reviewing the decisions of other courts to determine whether they represented substantial departures from prior decisional law." *Id.* at 359.

Petitioner responds to this concern by asserting that its "proposed ad-hoc [judicial takings] test can be applied easily just like other ad-hoc tests this Court has developed." Pet. Br. 48 (citing *Penn Central Transp. Co. v. New York City*, *supra*, 438 U.S. 104). Members of this Court and others, however, have found nothing easy about ad hoc takings tests. Referring to *Penn Central*, for example, Justice Kennedy explained that "[c]ases attempting to decide when a regulation becomes a taking are among the most litigated and perplexing in current law." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 541 (1998) (Kennedy, J., concurring and dissenting); see also Michael B.

Kent, Jr., *Construing The Canon: An Exegesis Of Regulatory Takings Jurisprudence After* Lingle v. Chevron, 16 N.Y.U. Envtl. L.J. 63 (2008) ("It is by now axiomatic that regulatory takings jurisprudence over the last three decades has been 'muddled,' 'confused,' and 'a constitutional quagmire.'").

Although *Lingle v. Chevron U.S.A., Inc., supra,* 544 U.S. 528 added needed coherence to takings law, petitioner seeks to go in the opposite direction by having this Court adopt a new, confusing judicial takings doctrine. Petitioner's proposed ad hoc test would encourage litigation, not contain it, and would generate countless disputes over its application. In addition, it would spark numerous procedural battles as the courts decipher the rules governing how these claims should be brought.[9] Takings law would once

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[9] For example, would the taking occur when (1) the highest available court fails to meet petitioner's new ad hoc takings test (Pet. Br. 48), (2) the injured party then seeks compensation through a new lawsuit, and (3) the court then denies compensation? Petitioner did not do that here. Is petitioner's position that a judicial taking is ripe as soon as the highest available court does not meet the ad hoc test? Could a temporary judicial taking occur when a trial court fails to meet petitioner's ad hoc test, even if its decision is reversed on appeal? What party is liable for just compensation? For example, where the "judicial taking" was the result of a decision benefiting one private party over another private party, does the party that benefited owe damages? The trial court? The appellate court? If a court is potentially liable, would due process require the litigant asserting a judicial taking claim to name the court as a party? (That was not done here.) Would the Court of Federal Claims have jurisdiction to hear judicial takings claims against a federal

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again become "the lawyer's equivalent of the physicist's hunt for the quark." *Williamson County Regional Planning Comm'n v. Hamilton Bank of Jefferson City*, 473 U.S. 172, 199, n.17 (1985) (citation and internal quotation marks omitted).

CONCLUSION

This Court should not establish a judicial takings doctrine.

Respectfully submitted,

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appellate court, or even this Court? Would compensation be barred because the alleged judicial taking was not "authorized" by Congress or by the state legislature? See *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 127, n.16 (1974). The courts will be plagued with these and no doubt many other questions if this Court creates a judicial takings doctrine.

AMICUS CURIAE BRIEF

(10)

Supreme Court, U.S.
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No. 08-1151

In the

Supreme Court of the United States

STOP THE BEACH RENOURISHMENT, INC.,

Petitioner,

v.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, et al.,

Respondents.

On Writ of Certiorari to the Florida Supreme Court

BRIEF AMICUS CURIAE OF CATO INSTITUTE, NFIB LEGAL CENTER, AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The Florida Supreme Court invoked "nonexistent rules of state substantive law" to reverse 100 years of uniform holdings that littoral rights are constitutionally protected. In doing so, did the Florida Court's decision cause a "judicial taking" proscribed by the Fifth and Fourteenth Amendments to the United States Constitution?

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IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37, the Cato Institute, the National Federation of Independent Business Small Business Legal Center (NFIB Legal Center), and Pacific Legal Foundation (PLF) respectfully submit this brief amicus curiae in support of Petitioner Stop the Beach Renourishment, Inc.[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, publishes the annual *Cato Supreme Court Review*, and files amicus briefs with the courts.

The NFIB Legal Center, a nonprofit, public interest law firm established to be the voice for small business in the nation's courts and the legal resource for small business, is the legal arm of the National Federation of Independent Business (NFIB). NFIB is the nation's leading small business association,

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[1] Pursuant to this Court's Rule 37.3, all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents approximately 350,000 member businesses nationwide. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

PLF was founded over 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF has participated in numerous cases before this Court both as counsel for parties and as amicus curiae. PLF attorneys litigate matters affecting the public interest at all levels of state and federal courts and represent the views of thousands of supporters nationwide who believe in limited government and private property rights.

PLF attorneys represented property owners in this Court in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997), and *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987), and PLF participated as amicus curiae in *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005), and *Lucas v. S. C. Coastal Council*, 505 U.S. 1003 (1992). PLF filed an amicus brief in support of the Petition for Certiorari in this case, 129 S. Ct. 2792 (2009), and participated as amicus curiae in the court below in support of Petitioner. *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102 (Fla. 2008).

SUMMARY OF ARGUMENT

In the opinion below, the Florida Supreme Court departed from long-established state law protecting the property rights of beachfront landowners. *Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102. As Justice Lewis noted in his dissent, the decision summarily altered the definition of littoral property that had governed in Florida: "In this State, the legal essence of littoral or riparian land is contact with the water. Thus, the majority is entirely incorrect when it states that such contact has no protection under Florida law and is merely some 'ancillary' concept that is subsumed by the right of access." *Id.* at 1122 (Lewis, J., dissenting). So drastic was the court's departure from settled precedent that it functionally eliminated fundamental constitutional protections that owners of beach property had relied on for almost 100 years.

This Court never has formally addressed the question of whether state court rulings eliminating formerly established property rights can effect a taking, or violate an owner's due process rights, under the United States Constitution. This Court has sanctioned, and applied, an analytical framework similar to the judicial takings doctrine in a variety of other contexts, holding that state court decisions, just like actions of the executive and legislative branches, can violate constitutional rights.

There is no textual or theoretical reason for this Court to deny property owners just compensation for a taking solely because the acting branch of government is judicial instead of executive or legislative. In fact, the realities of modern property law, including the authority of state courts to define background

principles of property law as recognized in this Court's opinion in *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1029-30, necessitate that property owners be protected, via the judicial takings doctrine, against state court decisions that abrogate constitutional rights.

ARGUMENT

I

THE JUDICIAL TAKINGS DOCTRINE IS NECESSARY TO PROTECT THE CONSTITUTIONAL RIGHTS OF PROPERTY OWNERS

This Court captured the theoretical basis for the judicial takings doctrine—so named though it incorporates due process guarantees as well—in *Lucas*.[2] In that case, the Court recognized that certain basic principles of property ownership are so fundamental as to be beyond the reach of the state, unless the state is willing to pay the owner for his property. *Lucas*, 505 U.S. at 1029-30. This Court arrived at that holding in part by way of negative examples; that is, by pointing to certain uses of property that, historically, *never* were lawful (and thus, the regulation of which could not require just

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[2] Justice Scalia's dissent in *Stevens v. City of Cannon Beach*, for example, contemplates the doctrine applying to both takings and due process under some circumstances. 114 S. Ct. 1332, 1335-36 (1994) (Scalia and O'Connor, JJ., dissenting). Others, such as Roderick E. Walston, advocate its application *only* to due process claims, despite the nomenclature. *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 Utah L. Rev. 379, 434-36 (2001).

compensation), the Court distinguished those incidents of ownership that *always* were lawful. *Id.* at 1030-31.

However, *Lucas* offers little guidance as to which aspects of property fit into which category. "This ambiguity has provided states with a loophole in the Lucas rule large enough to circumvent the rule entirely, provided that state courts are willing to be rather creative in defining background legal principles." W. David Sarratt, *Judicial Takings and the Course Pursued*, 90 Va. L. Rev. 1487, 1489 (2004). "States may thus attempt to avoid compensation altogether by announcing that under their background principles of state law, the property owner never had the property right she claims has been taken. Of course, state courts can pull off this ploy better than state legislatures." *Id.* at 1490.

It is this reality that makes the theory of judicial takings necessary for protecting property rights. It is true that the courts are better equipped to define what constitutes a *Lucas* background principle. This is because "legislatures are presumed to act prospectively, saying what the law shall be, while courts are presumed to decide questions retrospectively, saying what the law is and has been." *Id.* at 1491. But this dexterity, if uncabined by federal review, is not without peril:

> [W]hen state courts are understood to wield the power not only to declare the law, but also to make it, the Lucas rule's background-principles exception invites state courts to reshuffle property rights in ways that state legislatures cannot, potentially allowing the

> state to avoid paying compensation for takings of property.

Id.

A. Federal Courts' Reluctance To Apply the Judicial Takings Doctrine Encourages States To Restrict Property Rights

The federal courts' reluctance to apply the judicial takings doctrine sends a message to state legislatures to forego legislative changes in the definition of property rights, in favor of encouraging state courts to effect the same policy without exposing the state to liability for just compensation.

One such example is the public-versus-private dispute over Oregon's beaches. Until the late 1960s, "no question concerning the right of the public to enjoy the dry-sand area" of the beach had presented itself in Oregon. *State ex rel. Thornton v. Hay*, 462 P.2d 671, 674 (Or. 1969). This state of affairs lasted until 1967, "when the notoriety of legislative debates about the public's rights in the dry-sand area sent a number of ocean-front landowners to the offices of their legal advisers." *Id.* at 675.

In response to this heightened legal awareness, as well as this Court's respect for well-established understandings of private property interests in *Hughes v. Washington*, 389 U.S. 290 (1967), the Oregon legislature passed a law establishing the policy that the state, "through dedication, prescription, grant or otherwise," had the exclusive right to all "ocean shore" property, regardless of private ownership of upland

dry-sand areas. Or. Rev. Stat. § 390.610. The legislature was unambiguous: "[I]t is in the public interest to do whatever is necessary to preserve and protect scenic and recreational use of Oregon's ocean shore." Or. Rev. Stat. § 390.610(4). This mandate did not extend, however, to actually legislating the taking of private property. For as the Oregon Supreme Court noted, "[t]he state concedes that such legislation cannot divest a person of his rights in land." *Thornton*, 462 P.2d at 675 (citing *Hughes*, 389 U.S. 290).

The constitutional issues involved in such a legislative divestment were avoided, because the Oregon Supreme Court accomplished the state's aim itself in *Thornton*. *Thornton* involved an owner of private dry-sand beach property who sought to enclose his parcel. *Id.* at 672. The state challenged this proposed use, asserting it would frustrate the public's access to the beach. *Id.* Citing the legislature's "statute [that] codifies a policy favoring the acquisition by prescription of public recreational easements in beach lands," *id.* at 676, the court did what the legislature could not. It held the private owner had no superior right to his own land, and transformed the property at issue, and all similarly situated property statewide, from private to public without just compensation or due process. *Id.* at 678. This government sleight-of-hand, accomplished at the behest of the legislature via the court's "unexpected revival and modification of the English doctrine of custom," Lew E. Delo, *The English Doctrine of Custom in Oregon Property Law: State ex rel. Thornton v. Hay*, 4 Envtl. L. 383, 384 (1974), starkly illustrates the need for the judicial takings doctrine.

The government should not be encouraged, or permitted, to avoid paying just compensation by way of formalistic trickery. State courts, no less than state legislatures, declare what the law is. This is a fundamental tenet of American jurisprudence, recognized by this Court in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("[W]hether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."). Since *Erie* stands for the proposition that state courts are permitted to "make real law on behalf of the state," Sarratt, *supra*, at 1496, a state court's departure from established law must be treated by federal courts "as wielding real lawmaking power—including the ability to take property." *Id.* at 1497.

B. Federal Courts' Avoidance of the Judicial Takings Doctrine Is Particularly Harmful in the Context of Beachfront Property

The judiciary's ability to wield its power to make law is pronounced in property rights cases involving beach property, where judge-made law of custom governs. *See* William Blackstone, *Commentaries on the Laws of England*, Book II, ch. 17 (1765). Employing "custom as an end-run around *Lucas*," some state courts have "obliterated constitutional requirement[s] (whether articulated in a takings or due process idiom)" relating to property rights by invoking common law principles of custom that the courts themselves have developed. David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 Colum. L. Rev. 1375, 1438-39, 1442-43 (1996) (citing *Public Access Shoreline Haw. v. Haw.*

County Planning Comm'n, 903 P.2d 1246 (Haw. 1995); *Stevens v. City of Cannon Beach*, 854 P.2d 449 (Or. 1993)).

For example, in *Stevens*, owners of beachfront property in Oregon sought a permit to erect a seawall on their privately owned portion of the beach. When the permit was denied, the property owners brought suit, alleging the denial amounted to a taking of property under the Fifth and Fourteenth Amendments. A state trial court, followed by an Oregon appeals court, 835 P.2d 940 (Or. Ct. App. 1992), and the Oregon Supreme Court, 854 P.2d at 456, all rejected the takings claim.

The Oregon Supreme Court's basis for this rejection was its declaration that as a matter of state property law, the owners never possessed a right to their land superior to the public's right of access to the dry-sand area of the beach. 854 P.2d at 453-54. Only one year after this Court's decision in *Lucas*, the Oregon Supreme Court was cognizant enough of that holding's implications to broadly assert that Oregon's common law of custom satisfied *Lucas*'s focus on ackground principles. *Id.* at 456.

As *Stevens* illustrates, in the absence of federal review, state courts are free to fashion whatever rules they choose without being cabined by constitutional boundaries. That is, property rights amount to whatever a state court declares property rights, via background principles, to be. Justice Scalia, joined by Justice O'Connor in dissenting from this Court's denial of certiorari in *Stevens*, recognized the potential for state courts to overstep their bounds in their roles as definers of background principles: "Our opinion in

Lucas, for example, would be a nullity if anything that a state court chooses to denominate 'background law'–regardless of whether it is really such–could eliminate property rights." *Stevens v. City of Cannon Beach*, 114 S. Ct. at 1334 (Scalia and O'Connor, JJ., dissenting). The only solution to this problem is for the federal courts to hold all branches of government responsible for adhering to the mandates of the United States Constitution. *Chicago Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 234 (1897).

C. Federal Courts, Not State Courts, Should Define the Contours of the Takings and Due Process Clauses

Writing in the Virginia Law Review in 1990, Barton H. Thompson, Jr., authored the seminal article on the realities necessitating the judicial takings doctrine. Thompson's article identifies the need for federal courts to apply the judicial takings doctrine, focusing specifically on the importance of legal determinacy. Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449, 1496-98 (1990). Because sudden changes from established precedent often are a signal that state courts have abdicated their roles as the "generally less political" branch of government, the public can view these changes with skepticism: "Justice Stewart's suggestion that judicial changes in property law are takings only when 'sudden' and quite unpredictable may have been designed partially to ferret out the more questionable judicial changes." *Id.* at 1496-97 (citing *Hughes*, 389 U.S. at 296-97 (Stewart, J., concurring)). While slow, gradual changes in the common law assure property owners that legal considerations, not political ones, dictated a ruling,

"[n]o such assurances accompany a sudden and quite startling judicial shift in property rights." *Id.* at 1497.

Thompson's article is among the earliest, if not the first, to address scholarly opposition to the judicial takings doctrine. He writes that the "few scholars to have seriously addressed the issue have generally argued that it would be catastrophic to subject the courts to the same constitutional constraints as the legislative and executive branches, but with little illumination as to why." *Id.* at 1453. There is nothing in the text of the Fifth or Fourteenth Amendments that would deny an application of the judicial takings doctrine. While nothing in the Constitution's language compels such application, the "broad language certainly does not preclude application to judicial changes in property rights." *Id.* at 1456. As outlined in Part II *infra*, this textual imprecision has done nothing to preclude this Court's application of due process guarantees to the state courts. Nor does the fact that the courts have no "fiscal purse" of their own, *id.* at 1456, invalidate the doctrine, for "the executive branch also lacks a separate purse and yet there is no doubt that the fifth amendment applies to at least some executive takings." *Id.* at 1456, n.22.

The main focus of Thompson's article, though, is the "normative pulls and counterpulls that have shaped our takings jurisprudence." *Id.* at 1454. To this end, he returns repeatedly to the dangers of allowing state courts, charged with defining themselves what is and isn't property under *Lucas*, also to serve as final arbiter of the validity of these definitions under the United States Constitution. The other branches of government recognize that "[c]ourts

have the doctrinal tools to undertake many of the actions that legislatures and executive agencies are constitutionally barred from pursuing under the takings protections—and pressure is mounting for courts to use those tools." *Id.* at 1451. Interest groups, as well, are aware of the lack of boundaries placed on state judiciaries' treatment of property: "Faced by growing environmental, conservationist, and recreational demands, for example, state courts have recently begun redefining a variety of property interests to increase public or governmental rights, concomitantly shrinking the sphere of private dominion." *Id.*

These pressures are likely to increase. "Indeed, while paying lip service to stare decisis, the courts on numerous occasions have reshaped property law in ways that sharply constrict previously recognized private interests." *Id.* Perversely, this Court's opinion in *Lucas*, offering greater protections for owners of private property, perhaps has left state courts even more free to effect takings and deny due process, as they step in where legislatures and executives now are more afraid to tread. This Court should set boundaries for such state court action, and apply the judicial takings doctrine to decisions of state judiciaries that violate property owners' constitutional rights.

II

THE CONSTITUTION PROTECTS CITIZENS FROM STATE COURT DECISIONS THAT VIOLATE GUARANTEED LIBERTIES

In the first opinion to incorporate the Federal Takings Clause against the states, this Court explicitly held that incorporation applies to state courts as well as state legislatures and executives. *Chicago Burlington & Quincy Railroad Co.*, 166 U.S. 226. In *Chicago Burlington*, this Court held that "a judgment of a state court . . . whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment of the constitution of the United States." 166 U.S. at 241. *Chicago Burlington* declined to differentiate between takings and due process violations committed by state legislatures, and those effected by state courts: "[T]he prohibitions of the [Fourteenth] amendment refer to all the instrumentalities of the state—to its legislative, executive, and judicial authorities." *Id.* at 233. In this Court, for more than a century, "the final judgment of a state court is the act of the state for due process and takings purposes." Walston, *supra*, at 426. In property rights cases, then, the idea that state courts can violate due process guarantees, and take property, is as old as the incorporation doctrine itself.

The judicial takings doctrine finds analogues in other Court decisions holding that sudden judicial departures from settled state law violate citizens'

rights as guaranteed by the United States Constitution. For example, in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), this Court considered a Florida Supreme Court decision upholding a state statute permitting counties to seize the interest accruing on an interpleader fund paid into by private citizens. *Id.* at 155-56. As in the present case, the Court's analysis focused not as much on the relevant Florida statute as on the Florida Supreme Court's opinion interpreting that statute. This Court found that the Florida court's holding was unconstitutional, and that "[n]either the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as 'public money' because it is held temporarily by the court." *Id.* at 164. This Court concluded with a statement precisely on point for the present case: "[A] State, by *ipse dixit*, may not transform private property into public property without compensation . . . ." *Id.*

Similarly, in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), this Court was faced with a constitutional challenge to a state court decision that departed significantly from established jurisprudence governing a basic right. In *Bouie*, the South Carolina Supreme Court created an entirely new construction of a criminal trespass statute in order to uphold the convictions of two alleged trespassers. *Id.* at 362. This interpretation was such a departure from settled state law that this Court held it amounted to the imposition of an ex post facto law in violation of the petitioners' due process rights. *Id.* *Bouie* held that a state may not avoid constitutional restrictions on its power merely by delegating the restriction to the courts instead of

having them instituted by the elected branches: "If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Id.* at 353-54.

Several of this Court's opinions in civil rights cases of the 1950s and 1960s make no distinction between unconstitutional actions of state legislatures or executives and those of state judiciaries. In *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449 (1958), this Court vacated as unconstitutional a state court order enjoining NAACP activities. The *Patterson* Court found that abridgements of constitutional rights "may inevitably follow from varied forms of governmental action." *Id.* at 461. Among these state actions are decisions of state courts: "It is not of moment that the State has here acted solely through its judicial branch, for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize." *Id.* at 463. Six years after *Patterson*, this Court reaffirmed its holding by again striking down as unconstitutional, on due process grounds, a state court order that prohibited the NAACP from operating in Alabama. *NAACP v. Ala. ex rel. Flowers*, 377 U.S. 288, 306-08 (1964).

This Court's First Amendment jurisprudence is particularly notable for holding state judiciaries accountable for constitutional violations. In *Org. for a Better Austin v. Keefe*, 402 U.S. 415 (1971), this Court vacated an Illinois court order that enjoined an advocacy group from distributing pamphlets highlighting the real estate practice of racial

"blockbusting," holding the order was an unconstitutional restriction of free speech. *Id.* at 416, 420. Similarly, in *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964), this Court was presented with a state court's award of damages in a putative libel case brought by a public official. It was not an ordinance or statute, but ultimately the "judgment of the Alabama courts," that was subject to this Court's "constitutional scrutiny." *Id.* at 265. This Court held that the state court's actions violated the First Amendment. *Id.* at 292.

These cases, drawn from different factual settings and dealing with several different constitutional liberties, highlight the manner in which this Court has interpreted the United States Constitution to protect persons from the actions of state courts. This Court should apply the same constitutional protections to owners of private property.

CONCLUSION

"The United States Supreme Court's reluctance to apply the takings protections to courts proves particularly puzzling [] when one compares the Court's treatment of other constitutional restrictions that, unlike the takings protections, are essentially noneconomic." Thompson, *supra*, at 1456. This Court has recognized, and condemned, the disparity between the judicial treatment of property rights and that of other constitutional liberties. "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or

Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances." *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

This Court should end this relegation and extend constitutional protections to owners of property threatened by the actions of state courts.

DATED: August, 2009.

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AMICUS CURIAE BRIEF

(8)

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In the

Supreme Court of the United States

STOP THE BEACH RENOURISHMENT, INC.,
Petitioner,

v.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND, WALTON COUNTY, and CITY OF DESTIN,
Respondents.

On Writ of Certiorari
to the Supreme Court of Florida

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QUESTIONS PRESENTED

The Florida Supreme Court reversed 100 years of uniform holdings that littoral rights are constitutionally protected. Does this sudden and unpredictable change in the nature of property rights constitute a "judicial taking" without compensation proscribed by the Fifth and Fourteenth Amendments to the United States Constitution?

Is the Florida legislative scheme that allows an executive agency to unilaterally modify a private landowner's property boundary without a judicial hearing or the payment of just compensation a violation of the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, Center for Constitutional Jurisprudence[1] is dedicated to upholding the principles of the American Founding, including the important issue raised in this case of the protection of private property rights.

The Center participates in litigation defending the principles embodied in the United States Constitution. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases including *Hawaii v. Office of Hawaiian Affairs*, 129 S. Ct. 1436 (2009); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); and *United States v. Morrison*, 529 U.S. 598 (2000).

The Center believes the issue before this Court is one of special importance to the liberties that the Founders sought to protect with the Constitution. The Founders saw property rights as the cornerstone for other liberties. This case goes to the heart of the system of property rights with which the Founders

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief by filing a blanket consent with the clerk.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

sought to protect the other liberties we now take for granted. The Florida Legislature and Supreme Court in this case have upset the settled expectations of littoral property owners by eliminating constitutional protection for littoral property rights. Though the state will argue that it is acting in the best interests of the larger public, the Constitution demands due regard for individual liberty.

SUMMARY OF ARGUMENT

The Takings Clause of the Fifth Amendment codifies the Founders' view of property rights as the cornerstone of individual liberty. Pre-revolutionary legal history demonstrates the importance of property rights in the scheme of liberty protected by the constitution. The Founders' original understanding of the Takings Clause and the law that developed to interpret it during the earliest years of our nation requires that compensation be paid when property owners are stripped of a settled right in property. This compensation requirement grants flexibility to respond to public needs (such as beach erosion) while respecting individual rights.

I

THE FOUNDERS VIEWED PROPERTY RIGHTS AS INSEPARABLE FROM LIBERTY, AND THE GUARDIAN OF EVERY OTHER RIGHT

One of the founding principles of this nation was the view that respect for property is synonymous with personal liberty. In 1768, the editor of the Boston Gazette wrote: "Liberty and Property are not only join'd in common discourse, but are in their own natures so nearly ally'd, that we cannot be said to

possess the one without the enjoyment of the other." Editor, Boston Gazette, Feb. 22, 1768, at 1. This widespread association of liberty and property, particularly fueled by the availability of land, grew from the background and influence of English law and philosophy.

The Magna Carta of 1215, included the first safeguard of rights from infringement by the monarch. James W. Ely, Jr., *Is Property the Cornerstone of Liberty?*, Lecture at Conference on Property Rights at the Alexander Hamilton Institute for the Study of Western Civilization (Apr. 30, 2009), at 1, *available at* http://www.theahi.org/storage/Is%20Property%20the%20Cornerstone%20of%20Liberty-March%2011.doc (last visited Aug. 19, 2009). Article 39 of the Magna Carta provided, "No free man shall be . . . disseised . . . except by the lawful judgment of his peers or by the law of the land." Magna Carta, 1215, Article 39, *available at* http://www.constitution.org/eng/magnacar.htm (last visited Aug. 19, 2009). William Blackstone's Commentaries on English Law in 1765 expounded on the application of the Magna Carta and defined private property rights as both sacred and inviolable. It was the "absolute right, inherent in every Englishman . . . which consists of the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land." William Blackstone, 1 *Commentaries on the Laws of England* 135 (Univ. of Chicago Press 1979) (1765).

In the late seventeenth century, a wave of English political philosophers responded to the Stuart crowns' trespasses by developing theories of

property rights. Ely, *Lecture*, at 2. John Locke, the foremost of these influential thinkers, taught that the right to own private property was natural and in fact preceded the state's political authority. Locke's 1690 *Two Treatises of Government* suggested that rights in property were inseparable from liberty in general, and that the only purpose of government was to protect property and all of its aspects and rights. James W. Ely, Jr., *Property Rights: The Guardian of Every Other Right: A Constitutional History of Property Rights* 17 (1997). "The great and chief end therefore, of Mens uniting into Commonwealths, and putting themselves under Government, is the preservation of Property." John Locke, *Two Treatises of Government* 380 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690).

"Lockean" thinking helped to weaken claims of absolute monarchy in England and profoundly influenced 18th century Whigs. Their political and philosophical posture shifted to stress the rights of property owners as the bulwark of freedom from arbitrary government. Ely, *Property Rights*, at 17. Property ownership was identified with the preservation of political liberty.

Whig political thought and Blackstone's commentaries were widely studied and shaped public attitudes in colonial America, where property and liberty were inseparable. The Revolution, prompted by England's constant violation of property and commerce, is evidence of the depth of the Founder's commitment to the belief that rights in property could not be separated from political liberty. Arthur Lee of Virginia declared in his revolutionary 1775 publication, "The right of property is the guardian of

every other right, and to deprive a people of this, is in fact to deprive them of their liberty". Arthur Lee, *An Appeal to the Justice and Interests of the People of Great Britain, in the Present Dispute with America* 14 (4th ed. 1775).

In 1776, the Declaration of Independence solidified this tie between political liberty and private property. In drafting the Declaration, Thomas Jefferson did not distinguish property from other natural rights, remaining consistent with Whig philosophy and borrowing heavily from John Locke. Ely, *Property Rights*, at 17. Locke described the natural rights government that was formed to protect as "life liberty, and estates". Jefferson substituted "pursuit of happiness" for "estates", however this should not be misunderstood as any de-emphasis of property rights. Instead, the acquisition of property and the pursuit of happiness were so closely transposed that the founding generation found the naming of either one sufficient to invoke both. Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* 193 (1980).

"Liberty and Property" became the first motto of the revolutionary movement. Ely, *Property Rights*, at 25. The new Americans emphasized the centrality and importance of the right to property in constitutional thought. Protection of property ownership was integral in formation of the constitutional limits on governmental authority. *Id.* at 26. As English policies continued to threaten colonial economic interests, they strengthened the philosophical link between property ownership and

the enjoyment of political liberty in American's eyes. Adams, *The First American Constitutions*, at 193.

The widespread availability of land did not alter the view that rights in property could not be overcome by a simple public desire. Instead, it strengthened the view that property was central to the new American social and political order. *Id.* Early State constitutions explicitly reflected this fundamental principle in their language. New Hampshire's 1783 Constitution was one of four to declare "All men have certain natural, essential, and inherent rights—among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness." N.H. Const. pt. 1, art. 2.

Revolutionary dialogue and publications emphasized the interdependence between liberty and property. In 1795, Alexander Hamilton wrote "Adieu to the security of property adieu to the security of liberty. Nothing is then safe, all our favorite notions of national and constitutional rights vanish." Alexander Hamilton, *The Defense of the Funding System*, *in* 19 THE PAPERS OF ALEXANDER HAMILTON 47 (Harold C. Syrett ed., 1973). When the delegates to the Philadelphia convention gathered in 1787, they echoed this Lockean philosophy. Delegate John Rutledge of South Carolina, for instance, argued that "Property was certainly the principal object of Society." 1 *The Records of the Federal Convention of 1787* 534 (Max Farrand ed., Yale Univ. Press rev. ed. 1937).

The order in which James Wilson listed the natural rights of individuals in his 1790 writing is telling—property came unapologetically first: "I am

first to show, that a man has a natural right to his property, to his character, to liberty, and to safety." James Wilson, 2 *Collected Works of James Wilson* ch. 12 (Kermit L. Hall & Mark David Hall eds., 2007). Also in 1790, John Adams proclaimed "Property must be secured, or liberty cannot exist." John Adams, *Discourses on Davila*, *in* 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed., 1851).

In the minds of the Founders, property ownership was so closely associated with liberty that property rights were considered indispensible. The language of the Bill of Rights sharply underscores the Founders' understanding of the close tie between property rights and other personal liberties. It is of great significance that the Fifth Amendment contains key provisions safeguarding property as well as key procedural protections protecting other individual rights. This arrangement shows that the drafters saw no real distinction between individual liberty and property rights. Ely, *Lecture*, at 5.

The founding generation believed that all that which liberty encompassed was described and protected by their property rights. Noah Webster explained in 1787: "Let the people have property and they will have power that will forever be exerted to prevent the restriction of the press, the abolition of trial by jury, or the abridgment of many other privileges." Noah Webster, *An Examination into the Leading Principles of the Federal Constitution* 58-61 (Oct. 10, 1787). From the beginnings of our country, and always in the minds of the Founders, these rights stood or fell together. Ely, *Lecture*, at 5.

II

THE ORIGINAL UNDERSTANDING OF THE TAKINGS CLAUSE SHOWS HOW THE FOUNDERS PROTECTED INDIVIDUAL LIBERTY BY REQUIRING GOVERNMENT TO PAY COMPENSATION WHEN PRIVATE PROPERTY RIGHTS WERE TAKEN

With its limitations on the power of the Crown and recognition of individual liberties (for a few), the Magna Carta sowed the seeds for a new concept of government. Slowly, the idea began to take shape that individual citizens were the sovereigns and the state was subservient to them. Rights in property helped to propel this movement.

Blackstone's Commentaries showed that English law had built on Lockean ideas to broadly define the appropriate regard for private property rights: "So great moreover is the regard of the law for private property, that it will not authorize the least violation." Blackstone, *supra*, at 1:134. His Commentaries also addressed the eminent domain privilege of the state and paired it unequivocally with a just compensation principle in a precursor of the Takings Clause. Under English law in 1765, the state could take private property, but the owner was entitled to "a full indemnification and equivalent for the injury thereby sustained."

Even with labor short and land plentiful and cheap, colonists generally embraced the property-conscious tenets of English constitutional thought, later codifying especially the element of just compensation in the Takings Clause. As a group of German settlers in Maryland proclaimed in 1763,

"The law of the land is so constituted, that every man is secure in the enjoyment of his property, the meanest person is out of reach of oppression from the most powerful, nor can anything be taken from him without his receiving satisfaction for it." Dieter Cunz, *The Maryland Germans: A History* 126 (1948). However, the Colonists initially struggled with formulating governance that balanced individual rights with common good.

Notwithstanding this ethic of property rights, it soon became clear that a limit on the power of the government to take property would be required. Private property was taken without compensation during the Revolutionary era both to punish political opponents (royalists) and to accomplish public works on a limited budget. William Michael Treanor, *Note, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694 (1985). All of the states except South Carolina passed acts confiscating loyalist estates. Allan Nevins, *The American States during and after the Revolution, 1775-1789* 507 (1927). Undeveloped privately-owned land was also taken for roads. *See, e.g.*, Maryland Road Act: An Act to declare and ascertain the rights of citizens of this state to private roads or ways, Md. Stats. Ch. XLIX (1785). Only three of the original state constitutions discussed takings at all, Maryland, New York, and North Carolina, adopting the Magna Carta provision. 3 Francis Newton Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States Territories, and Colonies, nor or Heretofore forming the United States of America* 1688 (1909) (MD), 5 *id.* at 2632 (NY); 5 *id.* at 2788 (NC).

The compensation principle prior to the Revolution was imperfectly realized, but was nevertheless applied and practiced by the time of the Declaration of Independence. William B. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 579 (1972). Eminent domain was regularly employed, but on a limited scale. Apparent evidence of the fact that the founding fathers regarded just compensation as a fundamental principle is seen in the gradual abandonment by colonial lawmakers of the practice of taking land for roads without payment. Ely, *Property Rights*, at 25.

In 1784 James Madison successfully sponsored a bill to halt further confiscation of British property in Virginia under the Trespass Act. *Id.* at 36. The same year, Alexander Hamilton represented a British merchant stripped of property in *Rutgers v. Waddington*, securing partial victory when the Mayor's Court restricted the reach of the Act, holding that the legislature could not have intended to violate the law of nations. *Rutgers v. Waddington*, New York Mayors Court (1784) (reported in Julius Goebel, *Law Practice of Hamilton* 1:282-315 (1981)).

South Carolina had always allowed widows dower in their Loyalist husband's land by the state. Ely, *Property Rights*, at 36. Other state law makers began to relieve the people from anti-Loyalist confiscations. Even before the Takings Clause was added to the Constitution, this Court noted that seizure of property by the state without compensation is normally characterized as a trespass. *See Respublica v. Sparhawk*, 1 U.S. 357, 362 (1788).

The compensation principle was codified for the first time in Vermont's constitution in 1777, and Massachusetts followed suit with a confiscation provision in its 1780 constitution. These forerunners to the Takings Clause in the Fifth Amendment show the important shift in attitude with respect to the exercise of eminent domain power. The movement constitutionalizing a just compensation rule strengthened the legal position of the huge new class of American property owners. Ely, *Property Rights*, at 31. In the early years of the nation, jurists in states without such clauses cited the Magna Carta, Blackstone, New York's Chancellor Kent, and other sources, in ruling that the common law or natural law mandated the payment of compensation for an owner whose land is taken for public use. Bernard H. Siegan, *Property Rights: From the Magna Carta to the Fourteenth Amendment*, New Studies in Social Policy #3 109 (Sept. 19, 2001).

The Founders chose vigorous, logical debate in personal letters and formal publications in order to test the evolution and amalgamation of their ideas and come to some agreement on the nature of individual rights in property. These writings reflect that there were some early communal rights sentiments expressed on the far ends of the spectrum. The Founders were not afraid to test different ideas in their discourse and discard those untenable in order to find the best solutions. A letter from Thomas Jefferson to James Madison in 1785 stated, "Whenever there is in any country uncultivated land and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural right. The earth is given as a common stock for man to labour and live on."

8 Thomas Jefferson, THE PAPERS OF THOMAS JEFFERSON 681-82 (J. Boyd ed., 1953). Alexander Hamilton and the other thinkers of the time roundly rejected this approach though, arguing that inequality of property ownership should never cause society to abridge liberty. "Inequality will exist as long as liberty exists, and it unavoidably results from that very liberty itself." Siegan, *supra*, at 14.

It is worth noting that even in Jefferson's most liberal suggestions on the subject of subordination of individual advantage for the common good, he always balanced a public need of access or trespass upon private property rights with a just compensation principle. When weighing the proposition that "every man who cannot find employment but who can find uncultivated land shall be at liberty to cultivate it, paying a moderate rent" he provided ample evidence that a fair price for any taking must still be paid. Jefferson, *supra*.

Property rights and the other individual liberties upon which the nation was founded were inextricably linked in James Madison's works. In 1789, Madison introduced the Bill of Rights to the House of Representatives. James Madison, Speech by Congressman James Madison introducing the Bill of Rights at the First Federal Congress (June 8, 1789), *available at* http://www.usconstitution.net/madisonbor.html (last visited Aug. 19, 2009). Writing the year after the ratification of the Fifth Amendment, his eloquent essay, *On Property* stated:

> A man's land, or merchandize, or money is called his property. A man has a property in his opinions and the free communication of them. He has a property of peculiar

> value in his religious opinions . . . he has a property very dear to him in the safety and liberty of his person. . . . That is not a just government, nor is property secure under it, where the property which a man has . . . is violated by arbitrary seizures of one class of citizens for the service of the rest.

James Madison, *On Property*, Mar. 29, 1792 (Papers 14:266-68).

The essay continues to outline the fundamental beliefs behind the Takings Clause,

> If there be a government then which prides itself in maintaining the inviolability of property; which provides that none shall be taken directly even for public use without indemnification to the owner, and yet directly violates the property . . . which indirectly violates their property. . . . Such a government is not a pattern for the United States.

Id.

Madison's essay shows that the Founders supported on both legal and moral levels the just compensation principle in the Fifth Amendment. Treanor, *supra*, at 694. Legally, the Takings Clause bound the federal government to uphold the proposition that no land shall be taken even for public use without indemnification. More fundamentally, the requirement of just compensation evidenced the continuing concern that citizens should be secured in their property.

Early state judicial opinions reflected this concern and showed that protection against takings is not confined solely to direct damages. In 1816, Chancellor Kent required payment to a landowner suffering only indirect, consequential damages (a reduction in value). *Gardner v. Trustees of the Vill. of Newburgh*, 2 Johns. Ch. 162, 162 (N.Y. Ch. 1816). In 1841, the Connecticut Supreme Court further developed the protection for property rights ruling that owners were entitled to just compensation for damage to private property. *Hooker v. New Haven & Northampton Co.*, 14 Conn. 146, 1841 WL 343, at *11 (1841).

These political philosophies are reflected in the Takings Clause of the Fifth Amendment. The power of eminent domain is recognized—but just compensation to the owner is required.

III

THE ORIGINAL UNDERSTANDING OF THE TAKINGS CLAUSE REQUIRES COMPENSATION WHEN SETTLED PROPERTY RIGHTS ARE SUDDENLY ALTERED BY THE LEGISLATURE OR THE COURTS

The text of the Fifth Amendment is clear, "private property (shall not) be taken for public use, without just compensation." U.S. Const. amend. V. In this case, Florida decided to expand the public beach—but it did so at the expense of littoral property rights.

There is no question that states have long recognized the littoral rights as an important aspect

of property rights. Early writings and decisions make it clear that the concept of the littoral right to accretions was brought to America with the first Colonists. This has been long settled in our law. In 1865, Supreme Court Chief Justice Taney noted in *Banks v. Ogden*, 69 U.S. 57, 67 (1864), that "[a]lmost all jurists . . . both ancient and modern, have agreed that the owner of the land . . . bounded [by the sea], is entitled to these additions." These rights, including the right of access to the water, are in turn tied to the nature of littoral and riparian property as being in contact with the water.

Florida is no different. As noted in the dissenting opinion of Justice Lewis in the Florida Supreme Court, "In this State, the legal essence of littoral or riparian land is contact with the water. Thus, the majority is entirely incorrect when it states that such contact has no protection under Florida law." *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1122 (Fla. 2002) (Lewis, J. dissenting). Notwithstanding this long settled understanding that the littoral rights flow from the property's connection to the water, the Florida court ruled that Florida property owners no longer had a constitutionally protected property right to maintain contact with the water. The State of Florida is now free to sever all littoral rights (by severing the connection to the sea) without any obligation to pay compensation.

The Florida Court's sudden and unexpected reversal of long-settled property definitions works no less of a taking than an executive exercise of the power of eminent domain. This is no mean injury

which has been done. The individual right to own and use property that the Founders' viewed as critical to the protection of all other individual rights has been violated.

The Founders' legal and political background grew first from the background of Locke's compact they had brought with them to the new colonies. The purpose of government is to preserve liberty—especially the individual liberty in property. Locke, *supra*. A government that arbitrarily takes property "subverts the end of Government." *Id.* The writings during the founding era build on this premise. *See Calder v. Bull*, 3 U.S. 386, 388 (1798) (Opinion of Chase, J.).

> There are acts which the Federal, or State, Legislature cannot do, without exceeding their authority. There are certain vital principles in our free Republican governments, which will determine and over-rule an . . . abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof of the government was established. An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. . . . The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them. The Legislature may enjoin, permit, forbid,

> and punish. . . they may command what is right, and prohibit what is wrong; but they cannot change innocence into guilt;. . . or violate the right of . . . private contract; or the right of private property.

Id.

Case law after the Bill of Rights was ratified further expanded the notion that it was the duty of government to protect individual liberty including rights in property. James W. Ely, Jr., *Property Rights in the Colonial Era and Early Republic* 230 (1997). Lawyers representing individuals whose property had been taken by a state without payment uniformly contended that the Fifth Amendment's Just Compensation Clause was a national declaration of property rights. *See, e.g., Bonaparte v Camden & A.R. Co.*, 3 F. Cas. 821, 824 (C.C.D.N.J. 1830); *People v. Platt*, 17 Johns. 195 (N.Y. Sup. Ct. 1819); *Gardner*, 2 Johns. Ch. 162; *Lindsay v. Commissioners*, 2 S.C.L. (2 Bay) 38, 1796 WL 546, at *1 (1796).

In this case, the Court now faces the situation described by Justice Stewart in *Hughes v. Washington*, 389 U.S. 290 (1967). In his concurring opinion, Justice Stewart noted that

> the law of real property is, under our Constitution, left to the individual States to develop and administer.
>
> . . .
>
> But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such

> deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.

Id. at 295-97 (Stewart, J., concurring).

The plain language of the Fifth Amendment, the writings of the Founders, and the practices found on examination of Revolutionary history make the intent to protect settled property interests from uncompensated takings very clear. There is no exception carved from the word "taking" in the Takings Clause that would permit the state judiciary to take property by sudden changes in state property law. A judicial process is not due process for the taking of property unless it involves compensation.

CONCLUSION

This case has given life to the distant fears of the anti-Federalists of unjust takings by their own government, the very fundamental concern that the Takings Clause of the Fifth Amendment was written to address. The sudden re-definition of state property law by the Florida courts cannot insulate the Florida law from the requirement of compensation. The Founders rightly saw the protection of rights in property as the chief protection of other individual rights. Amicus does not doubt that Florida was pursuing goals that it thought were in the public interest. However, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a

shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

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AMICUS CURIAE BRIEF

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SUPREME COURT OF THE UNITED STATES
October Term, 2009

STOP THE BEACH RENOURISHMENT, INC.,
Petitioner,
v.
FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION AND CITY OF DESTIN, et al.,
Respondents

On Writ Of Certiorari To
The Florida Supreme Court

BRIEF AMICUS CURIAE OF CITIZENS FOR CONSTITUTIONAL PROPERTY RIGHTS LEGAL FOUNDATION, INC. IN SUPPORT OF PETITIONER

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INTERESTS OF THE AMICUS CURIAE[1]

Pursuant to Supreme Court Rule 37, the Citizens for Constitutional Property Rights Legal Foundation, Inc. (CCPR) respectfully submits this brief amicus curiae in support of Petitioner Stop the Beach Renourishment, Inc. Counsel of record for all parties received notice of CCPR's intention to file this brief on August 10, 2009. Further, by letter dated July 7, 2009, all parties consented to the timely filing of amicus briefs.

CCPR is a non-profit Florida-based organization, incorporated in 1994 and in good standing, to help citizens defend themselves against unjust laws and regulations and to challenge through litigation laws and regulations that take or devalue the property of individuals without just compensation. Its membership includes legal counsel, legal staff, professionals/experts, and supporting corporations and individuals. Its guiding principles include the belief that citizens should feel secure in their property, which should not be infringed upon without due legal process. Its parent organization, Citizens for Constitutional Property Rights, Inc., has existed since 1990 and works to prevent the erosion of property rights by unfair government action, including participation in amicus curiae briefs related to property rights issues.

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[1] Pursuant to Supreme Court Rule 37.6 the Amicus states that its counsel authored this brief. No counsel for a party authored this brief in whole or in part, and no person other than the Amicus and its members made a monetary contribution to the preparation of the brief.

The impact of this case on the Amicus and its members is significant. Some members are likely to be adversely affected by the decision of the Florida Supreme Court herein, particularly with regard to their rights of access to the Atlantic Ocean and the Gulf of Mexico, to maintain their properties' contact with the water, and to benefit from accretions and relictions affecting their properties. Because of its interest in protecting property rights, including riparian and littoral property rights, CCPR believes its perspective will aid the Court in its final decision.

SUMMARY OF ARGUMENT

The "right" of the State of Florida to take the constitutional littoral rights of a private property owner without due compensation does not exist. Similarly, if constitutional littoral rights are "vested" property rights or "property" under long-standing Florida common law, littoral owners hold justifiably high expectations with respect thereto, and the taking of their property without compensation and without due process is unconstitutional.

The standards for achieving common law vested property rights in littoral property are defined in terms of the littoral upland and differ significantly from the criteria pertaining to acquiring common law vested "development rights" in the development review process. However, the classification of a right as vested in both instances creates a reasonable and heightened expectation that such a right cannot be taken by the government without due process and just compensation.

The background principles of Florida real property law include the vested rights of littoral owners. The Florida Supreme Court cannot reject claims of littoral owners regarding violations of their constitutional property rights by retroactively asserting that such rights never existed, or by suddenly invoking new previously non-existent rules of state substantive law.

ARGUMENT

I. IF CONSTITUTIONAL LITTORAL RIGHTS ARE VESTED PRIVATE PROPERTY RIGHTS UNDER FLORIDA LAW, THE ALREADY HIGH EXPECTATIONS OF UPLAND LITTORAL OWNERS TO USE AND HAVE ACCESS TO THE ADJOINING WATER, AND TO MAINTAIN THEIR PROPERTIES' CONTACT WITH THE WATER ARE SIGNIFICANTLY ELEVATED, SO AS TO FURTHER PROTECT THEM FROM HAVING THEIR PROPERTIES TAKEN BY THE STATE WITHOUT JUST COMPENSATION OR DUE PROCESS.

A. The common law property rights of littoral owners have been shaped by decisions of the Florida Supreme Court over the past century which, until that court's decision now under review, have consistently recognized littoral rights as protected "vested rights," "property," "special rights," or in other similar terms.

It is well-established in property jurisprudence that property interests are created by state law.

> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

Littoral rights have repeatedly been described by the Florida Supreme Court in the most favored of legal terms such as "vested," "vested rights," "property," or "special rights."[2/] *See, e.g., Bd. of Trs. of the Internal Improvement Trust Fund v. Sand Key Assoc., Ltd.*, 512 So. 2d 934, 936 (Fla. 1987). These are not mere claims or theories, but are consistent rulings of the Florida high court for many decades regarding the *legal status* of littoral ownership. Indeed, the Amicus believes that the concept of vested rights as "property" merits

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2/ Vested littoral rights are defined in terms of the littoral upland, whereas vested rights in the development review process often depend upon an external event, such as the issuance of a lawful building permit approved pursuant to a local government's police power. *See* section I.B, infra. The Amicus, like the Petitioner, will attempt to use the term "littoral" throughout its brief, with some reference to "riparian," in recognition of the fact that Florida courts have used the terms "littoral" and "riparian" interchangeably. *See* Brief of Petitioner at 7, n.2.

consideration as a "background principle" (or even a "foreground principle") of Florida common law that favors littoral property rights. *See, e.g., Lucas v. South Carolina Coastal*, 505 U.S. 1003 (1982); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

"Vested rights" have been defined as follows:

> **Vested rights.** In constitutional law, rights which have so completely and definitely accrued to or settled in a person that they are not subject to be defeated or canceled by the act of any other private person, and *which it is right and equitable that the government should recognize and protect, as being lawful in themselves, and settled* according to the then current rules of law, and of which the individual could not be deprived arbitrarily without injustice, or of which he could not justly be deprived otherwise than by the established methods of procedure and for the public welfare. *Such interests as cannot be interfered with by retrospective laws; interests which it is proper for [the] state to recognize and protect and of which [an] individual cannot be deprived arbitrarily without injustice.* BLACK'S LAW DICTIONARY 1402 (5th ed. 1979).

Based upon decisions of the Florida Supreme Court since 1909,[3/] littoral property owners within

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[3/]These include *Bd. of Trs. of the Internal Improvement Trust Fund v. Sand Key Assoc., Ltd.*, 512 So. 2d 934, 936 (Fla. 1987); *Belvedere Dev. Corp. v. Dep't of Transp., Div. of*

the State have justifiably formed high "expectations" regarding the benefits arising from their ownerships. These are reasonable expectations that support their claims of entitlement to those benefits. The rights accruing to littoral owners constitute "property" in a constitutional sense.

The littoral owners' "property interest" in the benefits of their ownership would be highly reasonable even without all of the precedents emanating from the Florida high court over so long a period of time. However, the addition of these precedents wherein littoral rights have consistently been equated to "vested rights," or "property" (*Sand Key; Thiesen*, 78 So. at 507) has created "a legitimate claim of entitlement" to the protection of the littoral owners' rights. *See, e.g., Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016, n.7 (1992), the Court stated that in determining a takings claim, a court should consider how the "owner's reasonable expectations have been shaped by the State's law of property," that is "whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land" which the landowner contends has been eliminated or diminished in value.

Admin., 476 So. 2d 649, 652 (Fla. 1985); *State v. Fla. Nat'l Props., Inc.*, 338 So. 2d 13, 17 (Fla. 1976); *Brickell v. Trammell*, 82 So. 221, 227 (Fla. 1919); *Thiesen v. Gulf, Fla. & Ala. Ry. Co.*, 78 So. 491, 507 (Fla. 1917); *Broward v. Mabry*, 50 So. 826, 830 (Fla. 1909).

As stated by the Petitioner, "not one Florida Supreme Court case in 100 years–until now–has ever questioned or called into doubt the bedrock principle of Florida law that owners of littoral property had constitutionally protected property rights in the direct access to the ocean and the right to accretion." (Petition for Writ of Certiorari at 5.) Throughout this long period, Florida law has required landowners to own to the Mean High Water Line ("MHWL") in order to be considered a littoral owner and possess such rights. *Id.* All of this changed with passage of the Beach and Shore Preservation Act, Chapter 161 of the Florida Statutes (2003) (the "Act"), and the Florida Supreme Court's analysis of the Act in *Walton County v. Stop the Beach Renourishment*, 998 So. 2d 1102 (Fla. 2008). As stated in the Petition for Writ of Certiorari:

> [I]n its rush to restore "critically eroded" beaches,. . .[the State of Florida]. . .decided to sever an oceanfront property owner's contact with the ocean by unilaterally altering and replacing the MHWL as the property boundary for a 6.9 mile stretch of beach with a fixed "Erosion Control Line" ("ECL"). This 6.9 mile property boundary modification was accomplished through the simple recording of a single survey (affecting 453 individual properties, 5 of which belong to Petitioner's members) with no judicial approval required. The scheme of [the Act]. . . further results in a complete elimination of some of the 100-year-old littoral property rights and replaces them with statutory rights without

> any judicial proceeding or compensation. (Petition for Writ of Certiorari at 5-6) (footnotes omitted).

Upon the State's recording of a survey and replacement of the MHWL with a fixed Erosion Control Line ("ECL"), title to properties seaward of the ECL was "deemed to be vested in the State by right of its sovereignty." Fla. Stat. § 161.191 (1) (2003). The establishment of the ECL divested hundreds of upland riparian landowners of all of their common law littoral rights. Petition for Writ of Certiorari at 7-8. No judicial proceedings occurred and no compensation was paid. *Id.* at 6.

The decision of the Florida Supreme Court in *Walton County* eliminated or reduced many long-standing littoral property rights. The Florida Supreme Court upheld the Act and redefined the littoral right to accretion as "a contingent future interest [that] only becomes possessory if and when land is added to the upland by accretion or reliction." *Walton County*, 998 So. 2d at 1112. Thus, said the court, the littoral right of accretion is not 'implicated' or applicable.[4/] *Id.* at 1120. Further, the Florida high court held *inter alia*, for the first time–contravening a century of common law–

4/ Many decisions of the Florida Supreme Court have accepted the common law principle that title to additional lands caused by accretions and relictions is vested in owners of abutting waterfront lands. *See, e.g., Florida National; Brickell, Thiesen; Merrill-Stevens Co. v. Durkee*, 57 So. 428 (1911). In 1864, The United States Supreme Court recognized accretions and relictions as a vested property right. *See Banks v. Ogden*, 69 U.S. 57, 67 (1864).

that the constitutional right to have upland littoral property remain in contact with the MHWL is only "ancillary" to and subject to the right of access, and that "under Florida common law, there is no independent right of contact with the water." *Walton County*, 998 So. 2d at 1119.

B. The standards for achieving common law vested "property rights" in littoral property are defined in terms of the littoral upland and are significantly different from the criteria pertaining to common law vested "development rights" in the development review process.

In the traditional police power multi-stage development review process in place in most states, a pending–but not completed–project must have received a lawfully issued building permit in order to be vested.[5/] Unlike a vested development right achieved through the lawful issuance of a building permit or other external event in the development review process pursuant to a local government's

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5/ *See, e.g.*, John J. Delaney and Emily J. Vaias, *Recognizing Vested Development Rights as Protected Property in Fifth Amendment Due Process and Taking Claims*, 49 WASH. U. J. URB. & CONTEMP. L. 27 (Summer 1996). Thirty-one states rely in some fashion upon issuance of the building permit. *Id.* at 40-44. Vesting of pending projects in Florida has been based upon issuance of a building permit or on equitable estoppel. *Id.* at 51-52. Some states authorize vesting at an earlier point in the development review process, such as upon approval of a subdivision plan. *Id.*

police power,[6/] a vested right in littoral property is defined in terms of the littoral upland.

Florida common law for decades prior to the Florida Supreme Court's decision in *Walton County* reaffirmed that court's consistent application of vested rights analysis when dealing with littoral land. For example, in *Belvedere Dev. Corp. et al. v. Dep't. of Transp., Div. of Admin.*, 476 So. 2d 649 (Fla. 1985), the Florida high court stated that littoral and riparian rights in the State are "property." *Belvedere* 476 So. 2d at 652 (emphasis supplied). *Belvedere* further instructs that riparian rights are unique in character.

> The source of those rights is not found within the interest itself, but rather they are found in, and are defined in terms of the riparian upland. In most cases, therefore, *it is not difficult to find that riparian rights are an inherent aspect of upland ownership and are not severable from it.* *Id.* at 652 (quoting *Thiesen*, 78 So. at 507 (emphasis supplied).
>
> * * *
>
> Riparian rights are those incident to land bordering upon navigable waters. They are rights of ingress, egress, boating, bathing and fishing and such others as may be or

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[6/] For a leading case on vesting of development rights under various legal theories, *see, Western Land Equities, Inc. v. City of Logan*, 617 P.2d 388 (Utah 1980).

> have been defined by law. *Such rights are not of a proprietary nature. They are rights inuring to the owner of the riparian land but are not owned by him. They are appurtenant to and are inseparable from the riparian land.* The land to which the owner holds title must extend to the ordinary high water mark of the navigable water in order that the riparian rights may attach. Conveyance of title to or lease of the riparian land entitles the grantee to the riparian rights running therewith whether or not mentioned in the deed or lease of the upland. *Belvedere 476 So. 2d* at 652 (quoting FLA. STAT. ch. 197.228 (1983)) (emphasis supplied).

Again in 1987, in *Sand Key* the Florida Supreme Court, citing several precedents, reiterated that littoral rights are "legal rights" and for "constitutional purposes, the common law rights...of littoral owners *constitute property.*" *Sand Key,* 512 So. 2d at 936 (emphasis supplied). The *Sand Key* court further stated:

> Riparian and littoral property rights consist not only of the right to use the water shared by the public, but include the following *vested rights*: (1) the right of access to the water, *including the right to have the property's contact with the water remain intact*; (2) the right *to use the water* for navigational purposes; (3) the right to an unobstructed *view* of the water; and (4) the *right to receive accretions and relictions* to

> the property. In *Brickell*, we said these riparian or littoral rights are '*property rights* that may be regulated by law, but may not be taken without just compensation and due process of law,' ... and *we recently reaffirmed that principle in Florida National Properties, Inc. Id.* (emphasis added) (citations omitted).

C. If littoral rights are vested property rights under Florida law, the expectations of the littoral owners regarding their right of access to the water, their right to have their properties' contact with the water remain intact, and related rights are patently reasonable, and the taking of their properties without compensation and without due process was unconstitutional.

The expectations of littoral owners regarding the use of their properties are dramatically increased and deserving of the Court's protection if their littoral rights have vested.

Based upon *Sand Key* (1987); *Belvedere* (1985); *Florida National (1976) (riparian owner of land bounded by the ordinary high water mark is vested with title to land formed by accretion or reliction which cannot be taken without compensation in violation of the due process clause of the Fourteenth Amendment); as well as Brickell* (1919) 52 So. at 561 (littoral rights are "special rights" which are "easements" and "property rights"); *Thiesen* (1917) 78 So. at 507 (riparian rights are "property"); and other decisions of the Florida Supreme Court cited

in Footnote 3, supra, it is very probable that the rights of the littoral owners represented by the Petitioner herein to continue the present use of their properties and enjoy the benefits thereof had vested. If that is the case, their already reasonable and high expectations regarding their right of access to the water and to have their properties' contact with the water remain intact would have achieved an even higher degree of legitimacy and entitlement under Florida law.

D. The "right" of the State of Florida to take the constitutional littoral rights of a private property owner without due compensation is a right that does not exist

The State's physical taking of the vested littoral rights of hundreds of property owners without full compensation grossly exceeded its powers under the Takings Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment to the Federal Constitution. This action also violated Article X, Section 6 of the Florida Constitution. More than 90 years ago in *Thiesen*, the Florida Supreme Court stated:

> *Riparian rights we think are property, and, being so, the right to take it for public use without compensation does not exist.* The fronting of a lot upon a navigable stream or bay often constitutes its chief value and desirability, whether for residence or business purposes. The right of access to the property over the waters, the unobstructed view of the bay, and the

> enjoyment of the privileges of the waters incident to ownership of the bordering land would not, in many cases, be exchanged for the price of an inland lot in the same vicinity. In many cases, doubtless, the riparian rights incident to the ownership of the land were the principal, if not sole, inducement leading to its purchase by one and the reason for the price charged by the seller. *Thiesen*, 78 So. at 507.

The Court in *Thiesen* also cited to Justice Miller in *Yates v. Milwaukee* speaking for the Supreme Court of the United States:

> This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when *once vested, the owner can only be deprived in accordance with established law*, and if necessary that it be taken for the public good, *upon due compensation*. *Thiesen* 78 So. at 507 (quoting *Yates v. Milwaukee*, 77 U.S. 497, 504 (1870)) (emphasis added).

II. THE FLORIDA SUPREME COURT'S SUDDEN, UNPREDICTABLE CHANGE IN *WALTON COUNTY* REGARDING THE STATE'S COMMON LAW OF LITTORAL RIGHTS SHOULD RECEIVE HIGHER SCRUTINY FROM THE COURT, PARTICULARLY WHEN VESTED PROPERTY RIGHTS HAVE BEEN HARMED

In stark contrast to the total lack of any legal authority or government "right" to take the littoral owners' properties without just compensation, the littoral rights from which the affected property owners were dispossessed were "vested rights." *Thiesen,* 78 So. at 507. (As noted above, the common law in Florida would seem to qualify as a "background principle" of the State's law of property that supports the cause of littoral owners.) In any event, the vested rights of the affected property owners herein result in their having property interests of the highest order. Accordingly, they are entitled to Constitutional protection from such a sudden change in the State's law of property and from having their littoral rights physically taken without just compensation or due process. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982).

A. The Florida Supreme Court cannot reject the littoral owners' claimed violations of their vested constitutional property rights by asserting retroactively that such rights never existed

In *Walton County*, the majority opinion states that contact with the water is not the "legal essence" of littoral land, but is "merely" an "ancillary concept" that is subsumed by the right of access. *Walton County*, 998 So. 2d at 119, citing *Belvedere*, 476 So. 2d 649, 651-52 (Fla. 1985). To the contrary, based upon the reasons cited by the Petitioner (Petitioner's Brief at 21-27), this ruling appears to be directly contrary to *Belvedere, Sand Key, Florida National*, and the other cases cited in Footnote 3, *supra*.

Justice Stewart's concurring opinion in *Hughes v. State of Washington*, 389 U.S. 290 (1967), is cited often by the Petitioner.[7/] The issue before the Court in *Hughes* was whether federal or state law "controls the ownership of land, called accretion," that had been deposited gradually by the ocean on adjoining upland property.[8/] *Hughes*, 389 U.S. at

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7/ The Amicus Pacific Legal Foundation also states that Hughes is the "clearest and most influential opinion of the kind" on the subject of state court actions that precipitate a sudden or unpredictable change in state law. (Motion for Leave to File And Brief Amicus Curiae of Pacific Legal Foundation In Support of Petition For Writ of Certiorari, at 5.)

8/ The property had been owned by the United States prior to Washington's statehood in 1889. At that time, the Petitioner (Mrs. Hughes) had a common law right to include within her

290. Justice Stewart readily conceded that "as a general proposition...the law of real property is, under our Constitution, left to the individual States to develop and administer. And...to make changes, either legislative or judicial in its general rules of real property law," including those pertaining to the rights of riparian owners who remain subject to the "changing impact of these general state rules." *Id.* at 295. However, the State of Washington could not "take her land without just compensation," as the Supreme Court of Washington had done in terminating "the littoral rights of upland owners without compensation." *Id.* at 296. That decision was reversed and remanded.

However, Justice Stewart had more to say:

> To the extent that the decision of the Supreme Court of Washington [on the ownership issue] arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes *a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.*

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title any lands that accretion had gradually built up by the movement of the tides.

* * *

> The Washington court insisted that its decision was 'not startling'. *What is at issue here is the accuracy of that characterization.*
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> * * *
>
> There can be little doubt about the impact of that change upon Mrs. Hughes: The beach she had every reason to regard as hers was declared by the state court to be in the public domain. *Of course the court did not conceive of this action as a taking.*
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> * * *
>
> But *the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does.* *Hughes* at 296-298 citations omitted) (emphasis supplied).

Justice Stewart stated that although the State of Washington had not attempted to take the accreted lands by eminent domain, it had still effected a "retroactive transformation of private into public property–without paying for the privilege of doing so" in violation of the Due Process Clause of the Fourteenth Amendment. *Id.* at 298 (emphasis supplied).

B. The Florida Supreme Court may not defeat a littoral owner's vested property rights by invoking new, previously nonexistent rules of State substantive law, or by the artful denomination of previously unknown "background principles" of State law to create littoral rights that are "unconnected" with the shore

The aforementioned issue raised by Justice Stewart, discussed in Argument II.A., arose again a quarter-century later when Justice Scalia, joined by Justice O'Connor, dissented from the Court's denial of a Petition For Writ of Certiorari in *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 114 S. Ct. 1332 (1994). Similar to the case at bar, it involved the Oregon Supreme Court's application of the "restrictions that background principles of the State's law of property and nuisance already place upon land ownership," as discussed in *Stevens*, 114 St. Ct. at 1334 (discussing *Lucas*, 505 U.S. at 1029).

In *Stevens*, the owners of a beachfront parcel filed for a permit to build a seawall on the dry sand portion of their property. The permit was denied and an inverse condemnation action ensued. The Oregon Supreme Court affirmed the lower State court decisions in favor of the City, relying upon the "English doctrine of custom," which applied to "land used in a certain manner."[9/]

[9/] The doctrine of custom, an apparent background principle of Oregon law, was described by the Oregon Supreme Court as involving the following seven elements: "(1) so long that the mind runneth not to the contrary; (2) without interrup-

In dissent, Justice Scalia noted that the Oregon Supreme Court's reading of *State ex rel Thornton v. Hay*, 462 P.2d 671 (1969), under the background principles of *Lucas* was "unsupportable" and that *Lucas* would be a "nullity" if a state court could choose to denominate "background law," regardless of whether it really was such, to eliminate property rights:

> As a general matter, the Constitution leaves the law of real property to the States. *But just as a State may not deny rights protected under the Federal Constitution through the pretextual procedural rulings, neither may it do so by invoking nonexistent rules of state substantive law.*
>
> * * *
>
> [A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. *Stevens*, 114 S. Ct. at 1334 (quoting *Hughes*, 389 U.S. 290 at 296-297 (Stewart, J., concurring) (other citations omitted) (emphasis supplied).

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tion; (3) peaceably; (4) where the public use has been appropriate to the land and the usages of the community; (5) where the boundary is certain; (6) where the custom is obligatory (not left up to the individual landowners as to whether they will recognize the public's right to access); and (7) where the custom is not repugnant to or inconsistent with other customs or laws." *Stevens*, 114 S. Ct. at 1333, n.1.

If, in the present case, "background principles" of State law, as discussed in *Lucas* can be so easily reshaped into non-existent or unrecognizable rules of State law to wipe out vested property rights, what is to prevent creative state courts from further diluting *Lucas* by pouncing upon figments of imagined "new knowledge or changed circumstances [to] make what was previously permissible no longer so? *Lucas*, 505 U.S. at 1029.

Unfortunately, the fears expressed by Justice Stewart in *Hughes*, and by Justice Scalia in *Stevens*, have come to fruition in the case at bar. As noted in Argument I.B, supra. at 9-11, Florida Supreme Court precedents for a century adhered to the opposite approach, for example, that littoral rights are "property," inseparable from littoral uplands (*Belvedere*, 476 So. 2d at 652); that a littoral owner owns to the line of the high water mark (*Sand Key*, 512 So. 2d at 936); and that the littoral owner's right of access to the water includes the right to have the property's contact with the water remain intact. *Id.* The Court should not allow the Florida Supreme Court's sudden restatement of these littoral rights to stand.

CONCLUSION

The actions of the State of Florida herein, as upheld by the decision of the Florida Supreme Court in *Walton County*, have eliminated or severely diminished long-standing vested constitutional property rights of littoral owners in Florida. These include the right to accretion or reliction, the right to exclusive access from the upland to the water, the right to have one's property remain in contact with the water, and the right to an unobstructed view of the water. These vested rights created a heightened expectation and security in the property interests of the littoral owners that could not be taken without just compensation. Accordingly, the Amicus supports the arguments of the Petitioner, and requests the Court to grant the relief requested by the Petitioner.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

STOP THE BEACH RENOURISHMENT, INC.,

Petitioner,

v.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND, WALTON COUNTY, and CITY OF DESTIN,

Respondents.

ON WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

BRIEF AMICUS CURIAE OF COALITION FOR PROPERTY RIGHTS, INC. IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Is the Florida Supreme Court's approval of a scheme that eliminates constitutional littoral rights and replaces them with statutory rights a violation of the Due Process and Takings Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution?

Is the Florida Supreme Court's approval of a scheme that allows an executive agency to unilaterally modify a private landowner's property boundary without notice or a judicial hearing or the payment of just compensation a violation of the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Coalition for Property Rights, Inc. ("CPR") submits this amicus curiae brief in support of Petitioner Stop the Beach Renourishment, Inc.[1]

CPR, a Florida-based nonprofit organization, is a grassroots education and advocacy group dedicated to the preservation of private property rights. CPR was founded by Florida landowners to bring greater public awareness to the importance of private property rights and to unify property owners on the premise that "the right of acquiring and possessing property, and having it protected, is one of the natural, inherent and unalienable rights of man." *Vanhorne's Lessee v. Dorrance*, 2 Dall. 310 (D. Penn. 1795). Today, CPR's members and contributors represent a broad cross-section of Florida property and business owners, from individual homeowners to some of Florida's largest landowners. Among its members are owners of oceanfront property who are affected by the statute at issue in this case.

CPR has represented property owners and has participated as amicus in litigation before both Florida and federal courts. CPR hopes and expects that its

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[1] CPR confirms that (i) no person other than CPR, its members or its counsel made a monetary contribution to the preparation or submission of this brief, (ii) no counsel for any party authored any part of this brief, and (iii) no party or counsel contributed money intendedto fund the preparation or submission of this brief. The parties have filed blanket waivers consenting to the filing of amicus briefs.

Florida perspective will assist this Court in considering the weighty constitutional matters presented here.

SUMMARY OF THE ARGUMENT

The Florida Supreme Court below in *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So.2d 1102 (Fla. 2008),[2] leapt right past the confiscatory regulation that this Court upbraided in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141 (1986). This is no mere development exaction that went too far. As Justice Scalia noted, actual physical property confiscation to foster public access is an easy takings judgment. *Nollan*, 483 U.S. at 831. Littoral rights are water use appurtenances to oceanfront property, which may not be taken in Florida without compensation. *Broward v. Mabry*, 50 So. 826, 830 (Fla. 1909). No Florida Supreme Court decision has ever previously authorized outright confiscation of littoral or riparian rights of waterfront lands without compensation. The State Court below reversed over a century of established Florida

[2] Undersigned counsel discloses that Charles T. Wells, now a partner with GrayRobinson, P.A., participated in the Florida Supreme Court's decision below as a Justice of that court. *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So.2d at 1121 (Wells, J., dissenting). Accordingly, pursuant to Rule 4-1.12, Florida Rules of Professional Conduct, former Justice Wells has played no role in GrayRobinson's representation of CPR, having been timely screened from any participation in the matter. He will be apportioned no fee from this representation. In addition to this disclosure to this Court, timely written notice was provided to the parties, enabling them to ascertain compliance with Rule 4-1.12, Florida Rules of Professional Conduct.

law of littoral rights. That Court allows an executive agency to reframe the rights of oceanfront owners that are grounded in the Florida Constitution and a century of case law, and to leave the aggrieved property owner with no meaningful remedy.

This Court emphasized in *Nollan* just how direct is the connection between deprivation of beachfront property rights and the right to compensation:

> Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, ... we have no doubt there would have been a taking . . . . *Indeed, one of the principal uses of the eminent domain power is to assure that the government be able to require conveyance of just such interests, so long as it pays for them.*

483 U.S. at 831 (c.o.) (e.a.).

Florida's Supreme Court went well beyond *Nollan*. It did not just impose an easement, although it did that as well. It redefined permanently the constitutionally based boundary between upland, beachfront parcels and submerged sovereign lands. As this Court held in *Nollan*, the state may completely redefine oceanfront property rights, but it must pay just compensation for rights lost as a result. The Florida Supreme Court left that part out, in violation of well established principles of Florida law, dating back to March 3, 1845.

ARGUMENT

Florida's Constitution provides, since 1970, that the State holds title in the public trust to lands waterward of the mean high water line along beaches. Private upland ownership is bounded by an ambulatory mean high water line. *See S. Ansbacher and J. Knetsch, The Public Trust Doctrine and Sovereign Land in Florida: a Legal and Historical Analysis*, 4 FSU J. L.U. & ENVTL. LAW 337, 365-69 (1989) (Florida Constitution and common law establish title boundaries along tidally influenced waters at mean 19-year value).

Florida's Supreme Court held in *Broward v. Mabry*, 50 So. 826, 830 (Fla. 1909), that riparian or littoral rights of access, wharfage and view appurtenant to ownership at the high water line "are property rights that may be regulated by law, but may not be taken without just compensation and due process of law." The State Court below ignored its own precedent in *State v. Fla. Natl Properties. Inc.*, 338 So. 2d 13 (Fla. 1976), which confirmed that the high water line is a transient, and not permanently fixed boundary. The Florida Supreme Court held in *Fla. Natl Properties* that an attempt to fix permanently that boundary by statute was unconstitutional. Nothing has changed from a century of state property law precedent. Nothing, except Florida's means to an end of accentuating public access across private lands for free. Fixing the otherwise ambulatory boundary deprives oceanfront owners of their littoral rights. It is a physical taking.

I. Background Principles Of State Law

One must analyze Florida law in determining two fundamental points. First, what constitutes a property right? Second, when has a state action so deprived property rights as to require compensation? Florida law has long held that riparian or littoral rights are appurtenant to ownership along navigable waters. Additionally, deprivation of any of those rights has long been held to be compensable.

Art. I, S.2 of the Florida Constitution provides:

> Section 2. Basic rights – All natural persons . . . . have *inalienable rights*, among which are the right to *acquire, possess and protect property* . . . .

(e.a.) The Florida Supreme Court noted in *Shriners Hospital v. Zrillic*, 563 So.2d 64, 67 (Fla. 1990), that property rights are "woven into the fabric of Florida history (citing to organic common law, the Declaration of Rights in Florida's original Constitution and the current State Constitution)." In significant part, the *Shriners* Court stated:

> [T]he phrase "acquire, possess and protect property" in article I, section 2, includes the *incidents of property ownership: the "[c]ollection of rights to use and enjoy property . . ."*

563 So.2d at 67 (c.o.) (e.a.b.c). The *Shriners* Court emphasized that these property principles are found as

well in the takings clauses of the Florida and U.S. Constitutions. *Id.* at n. 4. *Shriners* notes that real property rights are "inalienable rights grounded in natural law . . . ." and are protected by Art. I, s.2. *Id.* Even reasonable property regulation may require compensation. *Id.*

Shriners held that Florida real property rights stem from organic common law. 563 So.2d at 67, n. 4, and accompanying text. *See generally, State ex rel Davis v. City of Stuart*, 120 So. 335, 345 (Fla. 1929) (citing the Magna Carta, as well as U.S. and Florida Constitutions in stating: "Our chief existing guarantees of individual liberty and private property" must be "preserved by our constitutional guarantees from invasion or impairment by governmental power of any kind.").

Florida has long held that lands abutting navigable waters carry appurtenant riparian or littoral rights. *See e.g., Hayes v. Bowman*, 91 So. 2d 795 (Fla. 1957) (ruling that a parcel that fronted the navigable Boca Ciega Bay carried rights of wharfage and access to, and view of, the navigable water body).

Florida law is consistent with this Court's authority. In *Pollard v. Hagan*, 44 U.S. (How.) 212 (1845), this Court held that the Equal Footing Doctrine fixed boundaries of sovereign title to lands underlying tidal waters as of the date of admission to the statehood. Florida entered the Union March 3, 1845. This Court stated in *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378-80 (1977), that a state is free to retain title to certain sovereign beds, but may convey other sovereign beds to private grantees

or otherwise constrict the definition of sovereign lands after it achieves statehood:

> Once the equal-footing doctrine had vested title to the riverbed in [the state] as of the time of its admission to the Union, the force of that doctrine was spent; it did not operate after that date to determine what effect on titles the movement of the river might have.

429 U.S. at 371. In sum, each state's law governs how and whether sovereign lands are altered. *See, Barney v. Keokuk*, 94 U.S. 324 (1876) (holding that a state may convey sovereign lands to private grantees).

This case addresses titles along a tidally influenced water, the Gulf of Mexico. Roman jurists held that the sea and foreshore were *res communes*. W. BUCKLAND, A TEXTBOOK OF ROMAN LAW 184, 186 (1921). The dominant English Common Law rule held that the high water mark was the boundary between sovereign and upland ownership. *See, e.g., Fraser, Title to the Soil Under Public Waters - A Question of Fact*, 2 MINN. L. REV. 313, 321-22 (1918), *Atty Gen. v. Chambers*, 43 Eng. Rep. 486 (K.B. 1854). Pertinent to Florida, Spanish law also held that private ownership was bounded by the high water mark. *Apalachicola Land & Development Co. v. McRae*, 98 So.2d 505, 518 (Fla. 1973).

Under the Equal Footing Doctrine, Florida held sovereign title underlying all tidally influenced waters upon statehood. *See generally Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 108 S. Ct. 791 (1988)

(confirming that each state received title to all lands underlying tidally influenced waters upon statehood; holding also that each state may alter sovereign lands thereafter). Consistent with *Corvallis*, Florida early on altered boundaries along tidally influenced waters by common law to limit tidal lands owned by the sovereign to those under navigable waters. *See, e.g., State v. Black River Phosphate Co.*, 13 So. 640, 644 (Fla. 1893); *Clement v. Watson*, 58 So. 25 (Fla. 1925) (rejecting the "ebb and flow" test, in restricting sovereign lands to those under navigable waters). The 1968 Constitution was amended in 1970 to codify that boundary. The Constitution delineated the boundary between uplands and submerged sovereign lands as follows:

> The title to lands under navigable waters, within the boundaries of the state, which have not been alienated, *including beaches below mean high water lines*, is held by the state, by virtue of its sovereignty, in trust for all the people.

ART X, section 11, Fla. Const. (1968, am. 1970) (e.a.). That section remains today.

This Court established the Mean High Water Line (MHWL) as a suitable boundary for tidelands in *Borax Consolidated, Ltd. v. City of Los Angeles*, 296 U.S. 10 (1935). The *Borax* court considered the common law ordinary high water mark, which had been defined as the line of the medium high tide, and held that the scientifically determined MHWL was the modern

equivalent of that common law rule. 296 U.S. at 26-27. The MHWL is the average high tide over a 19-year lunar "epoch."

Florida's Supreme Court first considered the MHWL definition in *Miller v. Bay-to-Gulf, Inc.*, 141 Fla. 452, 193 So. 425 (1940). The Florida Court attempted to define the "ordinary high tide line" as "the limit reached by the daily ebb and flow of the tide." 193 So. at 428.

In 1974, Florida enacted Chapter 177, Part II, Fla. Stat., entitled the "Coastal Mapping Act." The amorphous definition of high tide line in *Miller* has been clarified by section 177.27(14) and (15), Fla. Stat.

> 177.27 Definitions — The following words, phrases, or terms used herein, unless the context otherwise indicates, shall have the following meanings:
>
> * * *
>
> (14) "Mean High Water" means the average height of the high waters over a 19-year period. For shorter periods of observation, "mean high water" means the average height of the high waters after corrections are applied to eliminate known variations and to reduce the result to the equivalent of a mean 19-year value.
>
> (15) "Mean High-Water Line" means the intersection of the tidal plane of mean high water with the shore.

In short, Florida's definition of MHWL since passage of Ch. 177, Part II, parallels *Borax*. *See Lee v. Williams*, 711 So.2d 57, 63 (Fla. 5th DCA 1998) (finding that sovereign lands under ART X, section 11, are "lands under navigable waters"). The decision below confirmed the first deviation from this long-standing definition. Florida has long acknowledged that riparian or littoral rights are appurtenances to lands on navigable waters, those rights cannot be taken without compensation:

> In so far as the declaration alleges the right of ingress and egress to and from the lot over the waters of the bay, it states a common law right appertaining to riparian proprietorship. The common law riparian proprietor enjoys this right, and that of unobstructed view over the waters, and in common with the public the right of navigating bathing, and fishing.

Webb v. Giddens, 82 So.2d 743, 745 (Fla. 1955), quoting *Thiesen v. Gulf, F&A Ry. Co.*, 78 So. 491, 501 (Fla. 1918). *Webb* noted that then Florida Statutes section 192.61, [and now section 253.141] "may be accepted as a partial codification of the common law on the subject." 82 So. 2d 745; *but see Feller v. Eau Gallie Yacht Basin*, 397 So.2d 1155 (Fla. 5th DCA 1987) (riparian rights stem from constitution and common law, and are not dependent on statute).

Florida's leading riparian case was *Hayes*, *supra*, 91 So.2d 795. The Florida Supreme Court explicated those rights further in *GFWFC v. Lake Islands, Ltd.*, 407 So.2d 189 (Fla. 1981), where the court held that a rule barring motorboats on a navigable lake was

constitutional in general, but struck it as applied to riparian owners along the lake:

> *For the riparian right of ingress and egress to mean anything, it must at the very least establish a protectable interest when there is a special injury.* To hold otherwise means the state could absolutely deny permissible access to an island property owner or block off both ends of a channel without being responsible to the riparian owner for any compensation. A waterway is often the street or public way; when one denies its use to a property owner, one denies him access to his property . . . . Reasonable access must, of course, be balanced with the public good, but a *substantial diminution or total denial of reasonable access to the property owner is a compensable deprivation of a property interest.*

407 So.2d at 193 (e.a.).

The seminal Florida treatise on water rights is MALONEY, ET AL, FLORIDA WATER LAW 1980 (Maloney). Maloney noted: "[T]he term mean high water line appears in Article X, section 11 of the Florida Constitution [and in several statutes]". *Id.* at 725. Maloney emphasized: "The Florida Coastal Mapping Act of 1974 is especially significant in this regard."

Maloney stated that the statutory definition partially codified common law. Maloney emphasized:

> In the Act it is expressly declared that the Florida Legislature "recognizes the desirability of confirmation of the mean high water line, as recognized in the State Constitution and defined in Section 177.27(15) as the boundary between state sovereignty, land and uplands subject to private ownership."

Id., quoting Florida Statutes Section 177.26.

Maloney listed the following cases that cited the above-noted definition by 1980: *Trustees v. Wetstone*, 222 So.2d 10, 13-14 (Fla. 1969); *City of Daytona Beach v. Tona-Rama*, 294 So.2d 73, 78 (Fla. 1974); *St. Jude Harbors, Inc. v. Keegan*, 295 So.2d 141, 142 (Fla. 2d DCA 1974); *Trustees v. Wakulla Silver Springs Co.*, 362 So.2d 706, 711 (Fla. 3d DCA 1978); and *St. Joseph Paper v. Trustees*, 365 So.2d 1084, 1087 (Fla. 1st DCA 1979). Maloney concluded:

> These recent decisions and the statutory provisions mentioned above indicated that the mean high water line is now *well-established as the legal boundary*, between private uplands and the state owned submerged lands in tidal waters of the state.

Maloney at 725 (e.a.).

Maloney explained that this meant "[m]any of the boundary and title problems which beset lands bordering waters are caused by changing shoreline." *Id.* at 726. Maloney noted that high water lines are ambulatory by definition, consistent with *Borax*. *Id.* at 720-22, 726-36. Maloney explained the general rule regarding "accretion," or gradual, imperceptible additions of soil to the shores":

> Florida follows the common law rule which vests title to soil formed by accretion along navigable waters in the owners of abutting lands.

Maloney at 727.

Maloney distinguished man-made additions to uplands, which do not generally alter waterfront boundaries in Florida. *Id.* at 729-30. Maloney noted a salient exception that stems from this Court's decision in *County of St. Clair v. Lovingston*, 90 U.S. 46 (1874), cited at Maloney, at 730-31:

> Generally, where the [upland littoral owner] claimant had no part in the erection of an obstruction causing accretion, the fact that the accretion was initiated or otherwise influenced by an artificial process will not impair his claim of title to the land formed.

Maloney at 730 (cits. om.):

Maloney cited *Trustees of the Internal Improvement Trust Fund v. Madeira Beach Nominee*, 272 So.2d 209

(Fla. 2d DCA 1973). The State there sought to enjoin the littoral land owner from constructing a seawall on accreted lands that resulted from a public project. The court refused, holding implicitly in pertinent part that vesting of accreted lands in the state as a result of a public works project would constitute a taking. Maloney at 733. This decision addressed Florida Statutes section 166.051, "which purported to vest title in the state to coastal accretions created by public works." *Id.* at 732.

The Florida Supreme Court agreed with *Madeira*, in *Board of Trustees v. Sand Key Assocs. Ltd.*, 512 So.2d 934 (Fla. 1987). The Court held that upland waterfront owners, who did not participate in improvements that resulted in accretion were entitled to that accretion. As in *Madeira*, the Court held that Florida Statutes section 166.051 did not vest title in the state against such an innocent landowner merely because of the perceived public benefit of the beach renourishment. The opinion cited a myriad of general authority and its prior opinions, including *Fla. Nat'l Properties*, in holding that the riparian right to alluvial deposits is a property right that cannot be taken without compensation.

II. The Act results in a physical taking of Petitioners' properties, in violation of the Fifth Amendment's Takings Clause and the Fourteenth Amendment's Due Process Clause.

Property rights – and especially real property rights – are fundamental to the preservation of liberty and freedom. In his *Second Treatise of Government*, John Locke observed that "[t]he great and chief end,

therefore, of men's uniting into commonwealths, and putting themselves under government, *is the preservation of their property.*"[3] This idea – that preservation of private property is necessary to fulfillment of our "social contract" – informed our founding fathers as they drafted the Fifth and Fourteenth Amendments to the U.S. Constitution.[4]

Applying these bedrock principles to the instant case, the Act results in clear confiscations of Petitioners' properties, including constitutionally protected littoral rights.

More specifically, the Act:

- results in changes to the property actually described in Petitioners' deeds, by changing the seaward boundary from the dynamic MHWL to the static Erosion Control Line (ECL);

- permits the State's contractors to place sand both seaward *and landward* of the MHWL – the sand placed landward of the MHWL altered the elevation and contours of Petitioners' dry sand properties without their permission, and is, by itself, a physical invasion;

[3] John Locke, *Second Treatise of Government*, Chapter IX: Of The Ends of Political Society and Government, ¶ 124 (1690) (e.i.o.).

[4] John Adams, *A Balanced Government* (1790) ("Property must be secured, or liberty cannot exist.")

- takes private oceanfront property, and turns it into ocean view property adjacent to a public beach;

- eliminates from the bundle of sticks comprising Petitioners' private property rights, the prized right to exclude others from this dry sand portion of the beach;

- confiscates entirely the constitutionally protected littoral right of accretion, replacing it with a fixed boundary (the ECL) that will never benefit from accretion; and

- confiscates entirely the constitutionally protected littoral right to have the property touch the MHWL, from which all other littoral rights spring.

These are all physical takings, not regulatory takings. Accordingly, compensation is a constitutional imperative under both the United States and Florida constitutions.

In physical takings cases, the government either takes title to what was private property, or authorizes a physical occupation of the property. *Yee v. City of Escondido*, 503 U.S. 519, 522 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Storer Cable TV of Florida, Inc. v. Summerwinds Apartments Assocs., LTD*, 493 So. 2d 417 (Fla. 1986). This case involves the more extreme version of physical taking – the Board of Trustees of the Internal Improvement Trust Fund has actually taken

title to previously private property, creating a public dry sand beach where none ever existed. In the process, the government has altered Petitioners' deeds, confiscated their littoral rights to touch the water and to receive accretions, has invaded private property by placing sand even landward of the MHWL, and has forever severed Petitioners' properties from the Gulf of Mexico. Petitioners are left with the same access to the water that members of the public have – that is, the shared right to access the water from the public beach. This amounts to a physical taking of property, not a mere regulation. *Nollan*, 483 U.S. at 831; *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (explaining the distinctions between physical and regulatory takings).

In attempting to "balance" the landowners' littoral rights against other countervailing interests (mainly the newly-created governmental duty to "protect" the beach), the Florida Supreme Court erroneously applied a multi-factor test in this physical takings case.[5] This Court's precedent establishes that physical invasions of property must always be compensated. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (finding a taking where government imposed a public right of access across private property to a private pond's waters).

By suggesting that the State's newly-created "duty to protect the beaches" should somehow be "balanced"

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[5] *Compare Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), which adopted a multi-factor test to determine a regulatory taking, with *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), which held that a physical taking per se required compensation.

against Petitioners' constitutionally protected property rights, the Florida Supreme Court runs directly afoul of this Court's precedent. As this Court observed in *Loretto*, "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Loretto*, 458 U.S. at 426. Accordingly, all of the "balancing" done by the Florida Supreme Court below must be rejected by this Court. *Loretto*, 458 U.S. at 432 (emphasizing that previous cases "state or imply that a physical invasion is subject to a balancing process, but they do not suggest that a permanent physical occupation would ever be exempt from the Takings Clause.") Petitioners' property rights have been physically taken without compensation, in violation of the United States and Florida constitutions.

Similarly, the Florida Supreme Court's opinion below includes much discussion of what sounds like the government's "police power" – its authority to act in the public's health, safety and welfare – without directly calling it the "police power" by name. *E.g., Stop The Beach Renourishment, Inc.*, 998 So. 2d at 1115 ("[T]he Act promotes the public's economic, ecological, recreational, and aesthetic interests in the shoreline."). But invoking these laudable public interests does nothing to address the real issues. Even if it was necessary to confiscate Petitioners' property rights to accomplish the Act's aims, this is irrelevant to the matter of whether a taking has occurred. A permanent physical occupation of property is a taking, "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Loretto*, 458 U.S. at 434-35; *Penn Central Transp. Co. v.*

City of New York, 438 U.S. 104 (1978). Further, it is well established in both this Court's precedents and in Florida law that even valid exercises of the police power can result in takings for which compensation is required. *See Nollan*, 483 U.S. at 834-836, 841-42 (California could regulate coastal development, and accentuate public access, but had to pay for public easement imposed on private parcel); *see also Dept. of Agriculture v. Mid-Florida Growers*, 521 So. 2d 103 (Fla. 1984) (full and just compensation required even for a valid exercise of police power); *Drake v. Walton County*, 6 So. 3d 717 (Fla. 1st DCA 2009).

Overlooked entirely in the opinion below is the fact that the Act operates to take from these landowners the right to exclude the public from their properties. This Court has pronounced that the right to exclude "is universally held to be a fundamental element of the property right, [which] falls within the category of interests that the government cannot take without compensation." *Kaiser Aetna*, 444 U.S. at 179-80, cited at *Nollan*, 483 U.S. at 831. Taking of the Petitioners' right to exclude the public from a private beach constitutes in and of itself a compensable taking of property.

In the Restatement of the Law of Property, the right to exclude others was recognized as inherent in the right to possess land:

> § 7 Possessory Interests in Land
>
> A possessory interest in land exists in a person who has a physical relation to the land

> of a kind which gives a certain degree of physical control over the land, and an intent so to exercise such control as to exclude other members of society in general from any present occupation of the land. [6]

In *Loretto*, this Court cited to Section 7 of the Restatement, pointing out that when the government physically occupies property, the owner is himself ousted from the property, and is prevented from possessing, using or disposing of the property. *Loretto*, 458 U.S. at 435-436. Similarly, *Kaiser Aetna* involved the Army Corps of Engineers' attempt to impose a navigational servitude that precluded the owners of a private pond from denying the public access to the pond. *Kaiser Aetna*, 444 U.S. at 167. This Court held that a public easement in the property effectuated an actual physical invasion. *Id.* at 179-80. In *Loretto* this Court observed that "an owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property . . . . property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property." *Loretto*, 458 U.S. at 436; *see also United States v. Causby*, 328 U.S. 256, 265 (1946).

To be sure, the State of Florida can take a portion of this beach for public recreational use, even without the renourishment project. The goal of providing the public with the opportunity to enjoy the dry portion of the beach, is laudable. The proper way to accomplish that aim under our constitutional system, though, is for

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[6] Restatement of Property § 7 (1936).

the State or municipalities to purchase the necessary property rights or to obtain them through eminent domain.[7] Such acquisitions for parks and for beach access are made routinely under the government's eminent domain power. Simply confiscating the property through legislative or judicial decree violates our constitutional prohibitions against the taking of private property without compensation. *See Nollan*, 483 U.S. at 831; *see also Bell v. Town of Wells*, 557 A. 2d 168, 180 (Maine 1989) (holding statute taking shorefront property through legislative codification of custom doctrine unconstitutional under both the United States and Maine constitutions).

It is, of course, not this Court's role to determine the amount of compensation that would be due the Petitioners if this Court upholds the Act but determines that the Petitioners must be paid for destruction of their property rights. *See Loretto*, 458 U.S. at 444 (acknowledging landowners' right to compensation for physical taking, but expressing no opinion regarding the amount of compensation due; instead this Court left that for the state court to consider on remand). Still, these owners paid a premium for the littoral rights and exclusivity that the Act now confiscates. *See Thiesen*, 78 So. 491, 507 (Fla. 1917) (observing that littoral rights

---

[7] Indeed, the Act expressly contemplates that condemnation might be necessary to acquire property needed for the renourishment project. Fla. Stat. 161.141 ("If an authorized . . . . beach renourishment . . . . project cannot reasonably be accomplished without the taking of private property, the taking must be made by the requesting authority by eminent domain proceedings.").

are often the driving factor in determining the price of waterfront properties).

These Petitioners purchased oceanfront properties, complete with the right to exclude. After full implementation of the Act, though, they will own only properties with an ocean view. Their properties will no longer touch the water, instead being separated from the water by a public beach on which vendors can buy or sell wares. Their littoral rights are now owned by the Board of Trustees. As applied, the Act has worked an illegal physical taking of Petitioners' properties.

III. The Majority Opinion Below Concluded Incorrectly that the Act Provides a Balancing of Interests, Rather than Taking of Littoral Rights.

The majority opinion below characterized the Act as instead providing "a careful balance between the interests of the public and the interests of the private upland owners." *Stop the Beach Renourishment*, 998 So.2d at 1115. Critical to the majority opinion was its determination that "at least facially, there is no material or substantial impairment of these [common law] littoral rights under the Act." *Id.* at 1115. The Court concluded:

> [T]he Act expressly preserves the upland owners' rights to access, use, and view, including the rights of ingress and egress. See section 161.201. The Act also protects the upland owners' rights to boating, bathing, and fishing. See id. Furthermore, the Act protects the upland owners' view by prohibiting the

> State from erecting structures on the new beach except those necessary to prevent erosion. *See id.* Thus, although the Act provides that the State may retain title to the newly created dry land directly adjacent to the water, upland owners may continue to access, use, and view the beach and water as they did prior to beach restoration.

998 So.2d at 1115.

In fact, these provisions do not provide any meaningful balancing of interests or replacement of the upland owner's littoral rights. The Act leaves the upland owner with no more use of the beach than the general public.

A. The Statute Cannot Preserve Common Law Littoral Rights Where the Property No Longer Extends to the Mean High Water Line.

Under Florida law, a landowner must have title to property touching navigable water to enjoy or assert riparian or littoral rights. *Sullivan v. Moreno*, 19 Fla. 200 (Fla. 1882), (plaintiff lacked standing because "simple possession of part of the soil between the lines of ordinary high tide and the edge of the channel" does not impart riparian rights); *Immer v. Weintraub*, 413 So.2d 47 (Fla. 3d DCA 1982) (owner of lot that did not abut canal had no standing to challenge the riparian

rights of another property owner). As the dissent below aptly described:

> By essential, inherent definition, riparian and littoral property . . . is that which is contiguous to, abuts, borders, adjoins, or touches water. See, e.g., *Brickell v. Trammell*, 77 Fla. 544, 82 So. 221, 229-30 (1919) (explaining that under Spanish civil law and English common law, private littoral ownership extended to the high-water mark); *Miller v. Bay-to-Gulf, Inc.*, 141 Fla. 452, 193 So. 425, 427 (1940) ("[I]*t is essential that [the property owners] show the ordinary high water mark or ordinary high tide of the Gulf of Mexico extended to their westerly boundary in order for them to be entitled to any sort of [littoral] rights . . . .*" (emphasis supplied)); *Thiesen v. Gulf, F & A Ry. Co.*, 75 Fla. 28, 78 So. 491, 500 (1918) ("At common law lands which were *bounded by and extended to the high-water mark* of waters in which the tide ebbed and flowed were riparian or littoral to such waters." (emphasis supplied)). In this State, the legal essence of littoral or riparian land is contact with the water. Thus, the majority is entirely incorrect when it states that such contact has no protection under Florida law and is merely some "ancillary" concept that is subsumed by the right of access. In other words, the land must touch the water as a condition precedent to all other riparian or littoral rights and, in the case of littoral property, this touching must occur at the MHWL.

Stop the Beach Renourishment, Inc., 998 So.2d at 1122 (Lewis, J., dissenting) (f.n.o.). Riparian (and littoral) rights cannot ordinarily be separated from the upland property. *Belvedere Development Corp v. D.O.T.*, 476 So.2d 649 (Fla. 1985).

In finding that the landowner's rights were not materially impaired, the Court referred to section 161.201, which provides in part that

> [a]ny upland owner or lessee who . . . ceases to be a holder of title to the mean high-water line shall, nonetheless, continue to be entitled to all common-law riparian rights except as otherwise provided in section 161.191(2), including but not limited to rights of ingress, egress, view, boating, bathing, and fishing.

The cases cited above show that once the upland property ceases to own to the mean high water line and loses contact with the water, the landowner ***cannot*** enjoy common law riparian rights under Florida law. Therefore, any rights created or protected by section 161.201 are **not** common law riparian rights, but are instead some form of statutory right. *Compare, Webb*, 82 So.2d at 745, where the Court noted Florida's riparian statute codified existing common law. These rights are not only more limited in scope than the lost riparian rights, they do not provide meaningful protections to the upland owner's interests.

B. The Act Destroys, Rather than Protects, the Upland Owner's Common Law Littoral Rights in the Sandy Beach.

The statutory "common law riparian rights" referenced in section 161.201 do not and cannot leave the upland owner with the rights to access, ingress, egress, bathing, fishing and use that property upland of an ECL previously enjoyed. By converting the sand beach above the actual mean high water line to public beach, the Act deprives the upland owner of any common law rights to use the beach and water, and leaves the upland owner with only those rights that any member of the public would enjoy.

Despite the "reservation" of common law riparian rights in the statute, the Florida Attorney General has determined that in the area seaward of an established ECL "the traditional uses for which are fishing, swimming, boating and other public purposes authorized by law, are held in trust for the public." *Florida Attorney General Opinion 79-71.* That is, after the establishment of an ECL, the general public has the same rights of use as a riparian owner in the entire sandy beach seaward of the ECL.

First, the upland landowner clearly loses the critical property right to exclude the public from the area between the high water mark and the ECL; that is, the right to a **private** sandy beach. The public generally has no right to cross privately owned sandy beach in order to gain access to navigable waters or the publicly owned wet sandy beach. *Madeira Beach Nominee, Inc.*, 272 So.2d 209. Florida law recognizes that this right to

exclude may be lost through dedication, prescription or by establishment of "customary use." *Trepanier v County of Volusia*, 965 So.2d 276 (Fla. 5th DCA 2007); *see also Reynolds v. County of Volusia*, 659 So.2d 1186, 1190 (Fla. 5th DCA 1995) (public had right to use beach under plat dedication); *City of Daytona Beach v. Tona Roma*, Inc. 294 So.2d 73, 78 (Fla. 1974) ("customary use" may be established if recreational use of beach is ancient, reasonable, without interruption and free from dispute). Prior to the instant case, Florida courts rejected universally government efforts to establish "public beach" rights on privately owned sandy beaches by statute or decree. *Trepanier*, 965 So.2d at 290 ("the specific customary use of the beach in any particular area may vary, but proof is required to establish the elements of a customary right."); *see also Florida Attorney General Opinion 02-38* (owners of private sandy beaches may complain to local law enforcement to prevent trespass until a court determines that the beach is subject to customary use). By allowing the government to create a new public beach seaward of the upland landowner's riparian property, the Act allows the government to displace the upland owner's right to a private sandy beach without the necessity of proving dedication, prescription or custom. This is wholly inconsistent with all prior Florida law, necessitating compensation.

The loss of the right to exclude the public from the dry sand beach destroys the value of the other common law littoral rights in the upland owner. Because there is public sandy beach between the water and the ECL, members of the public can freely set up blankets, umbrellas or cabanas, or sandcastles. Nothing in the

statute grants the upland owner a superior right to use this sandy beach so the upland owner will have no legal right to remove obstructing people, umbrellas, boats, sandcastles, etc., in order to exercise a traditional littoral right such as bringing a boat down to the water, launching or retrieving a boat, or even just swimming, fishing or otherwise accessing the water.

Section 161.201 provides that the state shall not allow any structure to be erected seaward of the ECL except as required to prevent erosion. This provision fails to protect the littoral right of view, which extends to the channel, and protects against structures or activities in the water. *Lee County v. Kiesel*, 705 So.2d 1013 (Fla. 2d DCA 1998) (bridge that cut in front of riparian property that materially interfered with riparian view of river was a taking). It also fails to protect the right of access, which at common law protects against structures or fill ***in the water*** that materially impair the ability of a boat to land upon or leave the property. *Webb, Thiesen, supra*. The Act therefore does not protect the upland owner from the types of encroachments that were remediable in *Kiesel, Webb,* and *Thiesen*.

Furthermore, the absolute prohibition against structures seaward of the ECL, along with the elimination of ownership to the mean high water line extinguishes (rather than merely regulate) the common law riparian right to wharfage. See *Freed v. Miami Beach Pier Corporation*, 112 So. 841, 844 (Fla. 1927); *Florida Attorney General Opinion 90-37* ("I have concluded . . . "wharfing out" is a riparian right incident to ownership of the upland property"). Under preexisting Chapter 161, Florida Statutes, and Florida

common law only an upland owner with riparian or littoral rights may apply to construct a wharf, pier or other structure that will require permission to use submerged lands. *See Webb, supra,* 82 So. 2d at 745.

C. The Landowner's Statutory "Riparian Rights" Are Unenforceable and Therefore Illusory.

Under common law, upland landowners have a number of avenues for vindicating their common law riparian or littoral rights. For example, Florida law holds that any private or public action or activity that materially impairs a riparian right creates special damages, even if that action involves the use of the public rights to navigate, swim, fish, or the like. *Ferry Pass Inspectors & Shippers Ass'n v. White's River Inspectors and Shipper's Ass'n*, 48 So. 643, *Deering v. Martin*, 116 So.54 (Fla. 1928) (threatening to place obstructions on sovereignty lands that would interfere with the rights of riparian owner causes special injury sufficient to enjoin sale); *Webb*, supra; *Lake Islands*, 407 So.2d 189 (rule prohibiting any motorboats on navigable lake enforceable as to non-riparian public but unreasonable and arbitrary as applied to riparian owners). A demonstrable interference with riparian rights establishes both standing and the irreparable harm necessary to support injunctive relief. *Ferry Pass, Deering, Webb*. Government actions that substantial impair or eliminate a riparian right, including the right to ingress and egress by boat, are compensable as takings. *Keisel*, 704 So.2d at 1014 (taking right of view); *Madeira Beach*, 272 So.2d at 214 ("a policy power regulation prohibiting swimming, fishing or boating may

be unchallengable by the public but constitute a taking with respect to a riparian"); *Florida Attorney General Opinion 85-47* (application of local ordinance prohibiting motor vessels within 300 feet of shore to riparian property could expose city to liability for compensation as taking).

Moreover, if a private party is using the (upland owner's) sandy beach, the owner can protect various riparian rights in the use of the sandy beach by having the intruder arrested for trespass. *Florida Attorney General Opinion 02-38*. This provides relief against the infrequent acts of particular individuals that might interfere with the upland owner's enjoyment of the right to use the beach or to launch or retrieve a boat from the beach.

Once an ECL is established and new public beach is interposed between the upland owner's property and the water, the Act leaves the landowner with no standing, or any effective legal means of vindicating the "rights" supposedly preserved by section 162.201. Florida courts look to legislative intent and language to determine whether a statute creates a cause of action. *Windom v. State*, 736 So.2d 741 (Fla. 2d DCA 1999) (statute requiring local governments to conform to state standards for traffic control devices did not create cause of action to stop city from installing non-standard devices); *Schupbach v. City of Sarasota*, 765 So.2d 131 (Fla. 2d DCA 2000) (city ordinance requiring abutting property owners to maintain sidewalks did not create cause of action against property owner who failed to do so). Nothing in the Act provides the upland owner with a statutory cause of action or a statutory remedy to

enforce its purported "common law riparian rights." This leaves the upland landowner looking to existing sources of law to protect these rights, and it is clear that existing law will not suffice.

Far from securing a private cause of action, section 161.201 provides:

> Neither shall such use be permitted by the state as may be injurious to the person, business, or property of the upland owner or lessee; and the several municipalities counties, and special districts are authorized and directed to enforce this provision through their respective police powers.

This statutory direction does not even *mention* littoral rights. Of course, after the imposition of the ECL, the upland property owner's property ends at the ECL and does not include any property rights to use the sand beach seaward of the ECL. This provision does not protect the upland owner against actions that impair traditional riparian uses if those actions occur on the sandy beach seaward of the ECL. Uses of the new sandy beach that are injurious to the upland property need no new protections; the upland owner already *has* the ability to use the sandy beach itself for traditionally littoral purposes. That needs protecting, and the statute does nothing to define or protect those interests. Moreover, nothing in this language gives the landowner the right to compel a local government or state agency to protect his rights against any particular encroachment.

Because the upland owner has no title interest below the ECL, criminal or civil trespass cannot be used to prevent members of the public from using the public beach to interfere with the upland owner's exercise of the statutory rights. Injunctive relief would be useless against random or occasional interference by individuals and is not specifically authorized by the Act.

Even if some group engaged in organized and recurring activities that interfered with the upland owner's enjoyment of the statutory rights, it is unlikely that a littoral owner could get relief in court. Because the upland owner has no easement or other legal right in the public beach seaward of the ECL, it is unlikely that a court would find the "clear legal right to relief" that a common law injunction requires in Florida. Furthermore, it is unclear that the upland owner could demonstrate "damages particular himself differing in kind as distinguished from damages differing in degree suffered by the community as a whole" so as to have standing for injunctive relief. *Boucher v. Novatny*, 102 So.2d 132, 135 (Fla. 1958); *Windom*, 736 So.2d at 743.

D. The "Rescission" Provisions of the Act Guarantee a Temporary Taking Rather Than Preventing a Permanent Taking.

The Court below interpreted the Act as guaranteeing that "in the event the beach restoration is not completed and maintained, the rights of the respective parties revert to the status quo ante." *Stop the Beach Renourishment*, 998 So.2d at 1115. This assumption formed part of the majority's determination that the Act "balances the interest and rights involved."

Id. This assumption was incorrect, and ignores effects that lock in, rather than prevent, the taking of the upland owner's riparian rights.

Section 161.211 provides for the rescission of the ECL under some circumstances. Section 161.211(1) provides that the ECL will be null and void if the beach renourishment is not commenced within two year **and if** landowners representing a majority of the lineal feet of the project request it in writing. Under section 161.211(3), if a substantial portion of the beach erodes past the established ECL, **and if** the owners of a majority of the linear feet of the project petition the Board, the ECL is void if the beach is not renourished again within one year.

Nothing in the Act provides that the rescission of an established ECL "undoes" the transfer of title that is effected by the recording of the ECL. By the terms of the statute, the recording of the ECL "vests title" to the lands seaward in the state, and landward of the ECL in the upland landowner. Nothing in the language in section 161.191(1) or any other provision of the Act would lead to the conclusion that the revocation of the ECL would or could "undo" the vesting of title. Furthermore, the provisions in section 161.211(1) and (3) for voiding the ECL are not self executing, but require a petition to be filed by landowners representing "a majority of the linear feet" of beach in the project. This means that there is no guarantee of relief to any particular landowner whose rights are taken by the recording of the ECL. Finally, even if the provisions did restore the upland owners' previous title rights, the landowner is

deprived of those rights with no corresponding benefit for at least one to two years.

Under section 161.211(2), the "provisions of section 161.191(2) shall cease to be operative as to the affected upland" if the agency charged with maintaining the beach fails to do so and "as a result thereof the shoreline gradually recedes to a point or points landward of the erosion control line." Under this provision, erosion landward of the ECL continues to decrease the upland owner's property. However, the ECL is not voided by this provision, nor is the "vesting of title" under section 161.191(1) undone. Therefore, if the shoreline then accretes back to the ECL, any further accretions still belong to the state. This provision does not protect the upland owner at all; instead, it protects the agency from legal responsibility to the upland owner for preventing further erosion.[8]

Nothing in section 161.211 provides meaningful protection to the rights of the upland land owner. The statute does not "balance the interests" of the landowner and the state, and return the landowner to the "status quo ante" if the state fails to live up to its end of the balance. Instead, the statute locks in the landowner's loss, provides only illusory rights or protections, and in fact guarantees that the landowner will be subjected to at least a temporary taking.

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[8] In a classic case of unintended consequences, the statute would, under these circumstances, divest the public from the right to use the wet sand beaches. Under the statute, the entire area landward of the ECL remains vested in the upland property owner, which would include areas of wet sand if the beach erodes landward of the ECL.

E. The Statutory Rights Provided are Ineffectual Replacements for Common Law Littoral Rights Because They Can Be Rescinded at Any Time.

Even if the Act were interpreted as providing legally defensible rights comparable to traditional riparian rights, the conversion of the ancient property right to a statutory right leaves the upland property owner with no meaningful replacement. 11th Circuit decisions accord statutorily created rights no inherent constitutional regard. They can be totally abrogated by later legislative acts, limited solely by minimal due process requirements. *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir 1994), *cert. den'd*, 513 U.S. 1110; 115 S.Ct. 898 (1995) ("state based rights may be rescinded so long as the elements of procedural – not substantive- due process are observed"); *Greenbriar Village, LLC v. Mountain Brook*, 345 F.3d 1258 (11th Cir. 2003) (city could amend zoning ordinance to extinguish rights in permits, limited solely by "rational basis" test). Nor are statutory rights protected by the takings clause absent some particular vesting under individual facts.

Mere "statutory rights" are not protected under 11th Circuit precedent from arbitrary and capricious deprivation by executive actors. *McKinney, supra; Paedae v. Escambia County*, 709 So.2d 557 (Fla. 1st DCA 1998) (citing *McKinney*); *City of Pompano Beach v. Yardarm Restaurant, Inc.*, 834 So.2d 861 (Fla. 4th DCA 2002) (citing *McKinney*); *Ammons v. Okeechobee County*, 710 So.2d 641 (Fla. 4th DCA 1998) (citing *McKinney, infra*, holding that "where a state-based

right is revoked, it may be constitutionally rescinded [by executive act] where procedural due process is observed"). Furthermore, statutory rights are no longer protected fully by procedural due process guarantees under the 14th Amendment: under current doctrine in the 11th Circuit, the procedural due process protections for a "statutorily created right" are limited to those found in the statute or common law. *McKinney, DeKalb Stone Inc. v. Dekalb County*, 105 F.3d 956 (11th Cir. 1997); *Boatman v. Town of Oakland*, 76 F.3d 341 (11th Cir. 1996) (plaintiffs were not entitled to any procedural due process protection against illegal deprivation of permit other than to repair to state court). Here, the Act gives no protections given to the landowner to vindicate the "statutory rights," so the landowner would not be entitled to any federal due process protection against any action that deprived the landowner of those rights.

This means that the Legislature could simply rescind the statutorily provided "common law riparian rights" for any reason, without being subject to damages under either substantive due process or as a taking.

CONCLUSION

Some of this Court's previous takings cases have required intricate and nuanced analysis. This case does not. *See Nollan*, 483 U.S. at 831 (physical takings require compensation).

Petitioners owned littoral property before implementation of the Act. Those littoral rights now belong to the State. Petitioners owned oceanfront land before implementation of the Act. Their land no longer touches the water. Thus the property is permanently severed from the water by a newly-created public beach owned instead by the State. Petitioners previously enjoyed the right to exclude others from their property. The public now has the right to come and go as it pleases. Petitioners' deeds once reflected ownership to the MHWL. The State has altered those deeds to now indicate ownership only up to the ECL. Petitioners objected to the State's contractor entering their properties to place sand both seaward and landward of the MHWL. The State required its contractor to dump the sand there anyway, changing the contours and elevation of the land.

The State has physically taken Petitioners' properties without compensation and has violated their rights to due process. This Court must reverse the Florida Supreme Court's opinion, and remand with instructions to either: (i) invalidate the ECL, reinstate Petitioners' deeds reflecting ownership to the MHWL, and pay compensation for the temporary taking of Petitioners' properties, or (ii) institute eminent domain

proceedings to fix the amount of compensation due for the permanent takings of Petitioners' properties.

Respectfully submitted,

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STOP THE BEACH RENOURISHMENT, INC.,

Petitioner,

v.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND, WALTON COUNTY, and CITY OF DESTIN,

Respondents.

On Writ Of Certiorari To The Florida Supreme Court

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Coastal States Organization (CSO)[1] was established in 1970 to represent the Governors of the nation's 35 coastal states, commonwealths and territories regarding legislative and policy issues relating to the sound management of coastal, Great Lakes and ocean resources.[2] CSO supports the shared vision of the coastal states, commonwealths and territories for the protection, conservation, responsible use and sustainable economic development of the nation's coastal, ocean and Great Lakes resources.

Amicus CSO has a vested interest in maintaining the vibrancy and longevity of the nation's coasts. One of the greatest threats facing the nation's coastal

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[1] The parties have filed letters consenting to the filing of any *amicus curiae* brief with the Clerk of the Court. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] The 35 coastal states, commonwealths and territories consist of: Alabama, Alaska, American Samoa, California, Commonwealth of the Northern Mariana Islands, Connecticut, Delaware, Florida, Georgia, Guam, Hawaii, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Texas, U.S. Virgin Islands, Virginia, Washington, and Wisconsin.

inhabitants and resources is climate change. CSO has issued two reports on the impacts of climate change on the coastal states, *The Role of Coastal Zone Management Programs in Adaptation to Climate Change* 2007, and a follow-up report, *The Role of Coastal Zone Management Programs in Adaptation to Climate Change, Second Annual Report* 2008.[3] Both reports highlight the significant burden on resource managers to balance the environmental and economic well-being of coastal communities in the face of rising seas, erosion, increased intensity and frequency of storms and other climate change impacts. In the past, this Court has looked to *Amicus* CSO as a reliable source of information regarding the coastal states and their sovereign rights.[4]

Amicus CSO respectfully submits this *amicus* brief in support of respondents in this case. In this brief, CSO focuses on the need for states to determine the most appropriate management tool to address climate change threats, specifically the interrelated threats of sea level rise, coastal erosion and increased storm intensity and frequency. This brief offers scientific, engineering and policy background on the ramifications of these emerging threats to America's coasts and explains the responsibility of states to protect proactively against such threats, and their

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[3] *Available at* www.coastalstates.org (last visited Sept. 26, 2009).

[4] *Phillips Petroleum Co. v. Miss.*, 484 U.S. 469, 476 (1988).

well-established authority to do so under long-standing federal and state law precedent.

SUMMARY OF ARGUMENT

The nation's coasts, both on the oceans and the Great Lakes, support important economic, environmental, and societal activities for the United States, its economy and its residents. Since the establishment of the nation, the coasts have been an integral part of the fabric of society, connecting the nation internally as well as with other countries, and providing transportation, food, recreation, wildlife habitat, and jobs. The coasts serve as home to more than half of the population of the United States. Residents on the coasts and inland depend on the strength of the environment and economy of the coasts to support that of the nation overall.

These extremely valuable resources, the coasts, are facing threats of epic proportion. Climate change, specifically the interrelated impacts of sea level rise, erosion, and increased storm intensity and frequency, is placing the nation's coasts and national prosperity in grave danger. Increasingly, the coasts are being ravaged by hurricanes, swept away by erosion, and disappearing as water creeps upon the beaches, dunes, roadways, and buildings. These changes in climate affect not only the environment, but also the society that has been founded on the coasts by generations of Americans. The costs of climate change

could be financially catastrophic to the nation so dependent on its coasts.

Well-established federal and state law provides that states, as sovereigns, determine a state's ownership in land and water. As climate continues to change, allowing states to best decide the tools that serve their needs for managing their coastal lands and waters will become more and more essential for the continued prosperity of the states and the nation. Florida, like all other states in the Union, has been entrusted with the management of these national resources, the coasts. Acting within its right as a sovereign, Florida correctly ensured the protection of its interest, and the interests of the nation as a whole, through its Beach and Shore Preservation Act. As such, the Court should affirm the Florida Supreme Court's ruling.

ARGUMENT

I. The Nation's Coastal Areas are Valuable Ecologic and Economic Resources

The United States is "a nation intrinsically connected to and immensely reliant on the ocean."[5] The nation depends on the oceans and coasts for food, recreation, jobs, wildlife habitat, transport of goods,

[5] U.S. COMMISSION ON OCEAN POLICY, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY, FINAL REPORT 1 (2004).

and climate control.[6] Furthermore, the coasts serve as home to the majority of Americans: in 2003, it was estimated that 153 million people, fully 53% of the population of the United States, lived in coastal counties.[7] This number grows every year; it is projected that another 26 million people will live along the coasts by 2015.[8] This is no coincidence; since America's beginnings, the oceans and coasts have been an integral part of national identity and livelihood.[9]

The environmental and economic well-being of the nation relies on the health of coastal ecosystems. A dynamic plane, the coastal ecosystem is a complex of plant, animal and micro-organism communities, minerals, and other resources in the environment, working together as a functional unit.[10] The vibrancy

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[6] PEW OCEANS COMMISSION, AMERICA'S LIVING OCEANS: CHARTING A COURSE FOR SEA CHANGE, A REPORT TO THE NATION ii (2003).

[7] KRISTEN M. CROSSETT ET AL., NAT'L OCEANIC AND ATMOSPHERIC ADMINISTRATION, POPULATION TRENDS ALONG THE COASTAL UNITED STATES: 1980-2008 1 (2004).

[8] DANA BEACH, PEW OCEANS COMMISSION, COASTAL SPRAWL: THE EFFECTS OF URBAN DESIGN ON AQUATIC ECOSYSTEMS IN THE UNITED STATES 1-2 (2002).

[9] BENJAMIN LABAREE ET AL., AMERICA AND THE SEA: A MARITIME HISTORY 1-15 (1998).

[10] ANDREAS FISCHLIN ET AL., ECOSYSTEMS, THEIR PROPERTIES, GOODS, AND SERVICES, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY, CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 214 (2007).

of this unit affects a broad spectrum of human health and well-being, from people living close by to those living in inland watersheds hundreds of miles away.[11] Aquatic ecosystems are especially important biodiversity "hotspots,"[12] contributing water quality, agriculture and fish, as well as carbon sequestration, and carbon emissions reductions.[13] Additionally, healthy coastal and marine ecosystems have a profound impact on weather patterns and the overall productivity of the oceans.[14]

In addition to being crucial to the survival of the nation's environment, America's oceans and coasts are essential to the economic success of the nation. Coastal counties produce more than 40% of the nation's economic output.[15] In fact, if coastal counties in the United States constituted a separate country, they would have the world's second largest economy.[16]

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[11] *Id.*

[12] *Id.* at 233 (citing WALTER REID ET AL., ECOSYSTEMS AND HUMAN WELL-BEING: SYNTHESIS 155 (2005)).

[13] FISCHLIN, *supra* note 10, at 233 (citing C. MAX FINLAYSON ET AL., ECOSYSTEMS AND HUMAN WELL-BEING: WETLANDS AND WATER SYNTHESIS 80 (2005)).

[14] FISCHLIN, *supra* note 10, at 234 (citing Robert Costanza et al., *The Value of the World's Ecosystem Services and Natural Capital*, 387 NATURE 253-60 (May 1997)).

[15] JUDITH KILDOW ET AL., NATIONAL OCEAN ECONOMICS PROGRAM, STATE OF THE U.S. OCEAN AND COASTAL ECONOMIES 15 (2009).

[16] LINWOOD PENDLETON, THE OCEAN FOUNDATION, THE U.S. ECONOMY NEEDS THE COASTAL ZONE MANAGEMENT ACT 1 (2009),

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America's coastal economy contributes five times more to the gross domestic product (GDP) than the financial sector,[17] and estuary ports are responsible for the passage of 75% of all United States trade.[18] Based on estimates in 2000, ocean-related activities contributed more than $117 billion to the national economy and supported over two million jobs.[19] In fact, coastal activities contributed over $1 trillion, or one-tenth, of the nation's GDP in the year 2000.[20]

The coasts also serve as a popular destination, both for American tourists and travelers from abroad.[21] Travel and tourism represent one of the largest industries in the United States, and beaches are an integral part of this industry.[22] In 1995, 40% of Americans listed beaches as their preferred vacation destination.[23] In that same year, tourism revenue in the coastal states accounted for 85% of overall tourism revenues in the nation.[24] Tourism and

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available at http://www.coastalvalues.org/czmaecon.pdf (last visited Oct. 1, 2009).

[17] PENDLETON, *supra* note 16, at 3.

[18] *Id.*

[19] U.S. COMMISSION ON OCEAN POLICY, *supra* note 5, at 2.

[20] *Id.*

[21] NATURAL RESEARCH COUNCIL, BEACH NOURISHMENT AND PROTECTION 14-15 (1995).

[22] *Id.*

[23] James R. Houston, *Beach Nourishment*, 63(1) SHORE AND BEACH 21-24 (1995).

[24] *Id.*

recreation spending on United States coasts contributes $70 billion annually to national revenue.[25]

A. National Economic Prosperity is Dependent on State Coastal Economies

Coastal states provide valuable jobs and generate substantial income for the nation through transportation, commerce, fishing, residential development, tourism, and other activities. In Maryland, the Coastal Bays region attracts approximately five to ten million vacationers per year and generates roughly $700 million in employee income.[26] In 2006, Maryland tourism generated roughly $11.72 billion in visitor spending, directly supported 116,000 jobs, and created $920 million in state and local tax revenues.[27] Likewise, in South Carolina, visitors and local residents spend approximately $3.5 billion annually visiting the beaches, supporting 81,000 jobs in the state.[28] Coastal tourism overall in South Carolina

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[25] PENDLETON, *supra* note 16, at 3.

[26] THE GREELEY-POLHEMUS GROUP, INC., AN ASSESSMENT OF THE ECONOMIC VALUE OF THE COASTAL BAYS' NATURAL RESOURCES TO THE ECONOMY OF WORCESTER COUNTY, MARYLAND 12 (2001), *available at* http://dnrweb.dnr.state.md.us/download/bays/cbassessment.pdf (last visited Oct. 1, 2009).

[27] CENTER FOR INTEGRATIVE ENVIRONMENTAL RESEARCH, CLIMATE CHANGE IMPACTS ON MARYLAND AND THE COST OF INACTION 15 (2008), *available at* http://www.cier.umd.edu/climateadaptation/Chapter3.pdf (last visited Sept. 26, 2009).

[28] South Carolina Department of Natural Resources, *Quick Facts About South Carolina's Natural Resource Assets*, *available*

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generates $9.56 billion a year.[29] In 2002, the Port of Charleston was responsible for 55,000 jobs with a total economic impact of $3.3 billion.[30] Similarly, in Texas, ports generate over $9 billion in federal tax revenue.[31] Visitors to Texas spend more than $7.5 billion annually in coastal tourism, primarily on trips to beaches.[32] In addition to tourists enjoying beach front areas, residents also take advantage of the shore; day use of Texas beaches accounts for $2.6 billion in revenues to the Texas economy.[33]

In New Jersey, tourism in coastal communities is a $16 billion industry employing hundreds of thousands of people.[34] The Port of New York-New

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at http://www.dnr.sc.gov/green/green.html (last visited Sept. 21, 2009).

[29] John H. Tibbetts, *The Coast's Great Leap*, 19(2) SOUTH CAROLINA SEA GRANT COASTAL HERITAGE 3-11 (2004).

[30] *Id.*

[31] Texas A & M University at Galveston, Center for Texas Beaches and Shores, *The Dynamic Texas Coast* (2006), *available at* http://www.tamug.edu/CTBS/about_us/history-mission/doc/Texas%20Coast%20Powerpoint.pdf (last visited Sept. 28, 2009).

[32] *Id.*

[33] Jesse Solis, Jr., Presentation at the 27th Annual Submerged Lands Management Conference, Traverse City, Michigan, *Water Dependent Uses and Coastal Development*, 13 (2008), *available at* http://www.submergedlands2008.com/presentations/Solis_session7ISLMC08.pdf (last visited Sept. 21, 2009).

[34] New Jersey Department of Environmental Protection, Coastal Management Program, *What Is the New Jersey Coast?* 1 (2002), *available at* http://www.state.nj.us/dep/cmp/fact2.pdf (last visited Sept. 29, 2009).

Jersey is the largest container port on the East Coast of the United States, providing 193,000 jobs and handling 18 million tons of cargo per year.[35] Similarly, Georgia generates $2 billion annually in tourism.[36]

In Massachusetts, coastal tourism, shipping, and commercial fishing contribute an estimated $70.7 billion to the state economy annually.[37] Tourism alone contributes approximately $8.7 billion to the Commonwealth.[38] In 2004, Massachusetts' coastal economy was approximately $117 billion, or 37%, of that state's Gross State Product.[39] Additionally, the coastline of Massachusetts supports 152,000 jobs each year.[40] Furthermore, coastal economy establishments, such

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[35] *Id.*

[36] SOUTHERN ENVIRONMENTAL LAW CENTER, AT THE TIPPING POINT: A COMPREHENSIVE ASSESSMENT AND CONSERVATION ACTION PLAN FOR THE GEORGIA COAST 14 (2007).

[37] MASSACHUSETTS INSTITUTE OF TECHNOLOGY, SEA GRANT COLLEGE PROGRAM, STRATEGIC PLAN 2008-2012 (2008), *available at* http://seagrant.mit.edu/about_us/strategicplan/part1.html (last visited Sept. 21, 2009).

[38] UNIVERSITY OF MASSACHUSETTS PRESIDENT'S OFFICE, DONAHUE INSTITUTE, MASSACHUSETTS OFFICE OF COASTAL ZONE MANAGEMENT, AN ASSESSMENT OF THE COASTAL AND MARINE ECONOMIES OF MASSACHUSETTS 8 (2006), *available at* http://www.mass.gov/czm/oceanmanagement/projects/economy/report1.pdf (last visited Oct. 1, 2009).

[39] *Id.* at 22.

[40] Press Release, Massachusetts Ocean Coalition, *Massachusetts Leads the Nation by Passing First Ever Comprehensive Ocean Planning Bill* (May 22, 2008), *available at* http://www.massoceanaction.org/news3.html (last visited Sept. 21, 2009).

as marinas, restaurants, and stores, totaling 71,160 businesses, directly employ over a million citizens, representing 37% of state employment.[41] The marine economy, which is comprised of commercial seafood, transportation, tourism and recreation, science and technology, and marine-related construction and infrastructure, directly employs 152,440 persons in Massachusetts, 78% of which are employed in coastal tourism and recreation.[42]

The coasts on the Great Lakes provide a significant contribution to the nation's economy as well. In 2007, it was estimated that 804,381 jobs in the state of Michigan were Lake-influenced, generating approximately $54 billion in compensation.[43] Approximately 15% of all Michigan jobs and 23% of Michigan payroll are associated with the Great Lakes.[44]

Strong coastal economies are one of the reasons so many Americans call the coasts home. The coasts of Maryland serve as home to 68% of its population.[45] In New Jersey, fully 70% of the population lives in the

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[41] UNIVERSITY OF MASSACHUSETTS PRESIDENT'S OFFICE, *supra* note 38, at 22 (citing 2004 statistics).

[42] *Id.* at 25.

[43] MICHIGAN SEA GRANT COLLEGE PROGRAM, MICHIGAN'S GREAT LAKES JOBS 7 (2009), *available at* http://www.miseagrant.umich.edu/downloads/coastal/economy/09-101-Jobs-Report.pdf (last visited Oct. 1, 2009).

[44] *Id.*

[45] MARYLAND'S COASTAL PROGRAM, COASTAL FACTS (2002), *available at* http://www.dnr.state.md.us/bay/czm/coastal_facts.html (last visited Sept. 21, 2009).

state's coastal counties.[46] a remarkable 67% of Massachusetts' population lives in coastal counties,[47] and nearly five million residents, or three-quarters of the population, reside within ten miles of the ocean.[48] Thriving coasts attract more residents, account for higher property taxes within states, and generate income through various activities. These thriving economies drive a disproportionate share of the national economy, and invigorate the growth of the overall national economy. According to a 2009 report from the Bureau of Economic Analysis of the U.S. Department of Commerce, New York, Los Angeles, Chicago, Boston, San Francisco, and Miami were all in the top 15 GDP contributors to the nation.[49] All six cities are located directly on the coasts.[50]

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[46] SURFRIDER FOUNDATION, STATE OF THE BEACH REPORT: NEW JERSEY BEACH DESCRIPTION, *available at* http://www.surfrider.org/stateofthebeach/05-sr/state.asp?zone=MA&state=nj&cat=bd (last visited Sept. 29, 2009).

[47] SURFRIDER FOUNDATION, STATE OF THE BEACH REPORT: MASSACHUSETTS BEACH ACCESS, *available at* http://www.surfrider.org/stateofthebeach/05-sr/state.asp?zone=NE&state=ma&cat=ba (last visited Sept. 21, 2009).

[48] MASSACHUSETTS MARINE TRADES ASSOCIATION, MASSACHUSETTS BOATING ECONOMIC IMPACT STUDY (2001) *available at* http://www.boatma.com/boating_in_ma.html (last visited Sept. 21, 2009).

[49] Press Release, Bureau of Economic Analysis, *Economic Slowdown Widespread in 2008,* 4-8 (Sept. 24, 2009), *available at* http://www.bea.gov/newsreleases/regional/gdp_metro/2009/pdf/gdp_metro0909.pdf (last visited Oct. 1, 2009).

[50] *Id.*

These statistics show the significant contribution of states' coastal economies to the national economy. Without coastal states' beachfront communities and coastal ecosystems, there would be fewer jobs, less travel, and significantly fewer dollars entering the national marketplace. States must be allowed to protect, sustain and, where necessary, restore these important contributors to the nation's health and welfare.

B. Florida's Coastal Economy Exemplifies the Importance of State Coastal Economies

Surrounded by both the Atlantic and Gulf coasts, Florida is in the unique position of having abundant trade, travel, and commerce on two separate shores. A significant portion of Florida's substantial contribution to the United States economy is income derived from its coasts, especially its beaches. No point within the state is more than 75 miles from saltwater.[51] The state's shoreline extends 8,426 miles, with 825 miles of sandy beaches.[52] In 2006, Florida's coastal economy

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[51] Press Release, University of Miami Rosenstiel School of Marine and Atmospheric Science, *Scientists Unveil Florida Ocean and Coastal Economics Report* (June 13, 2008), *available at* http://www.rsmas.miami.edu/pressreleases/20080613-focc.html (last visited Sept. 30, 2009).

[52] JULIE HAUSERMAN, FLORIDA'S OCEAN AND COASTAL FUTURE: A BLUEPRINT FOR ECONOMIC AND ENVIRONMENTAL LEADERSHIP 2 (2006), *available at* http://www.nrdc.org/water/oceans/florida/flfuture.pdf (last visited Oct. 1, 2009).

generated almost $562 billion, or 86% of the state gross domestic product.[53] On average, Florida's shoreline contributes 75% of the state's economic productivity annually.[54] Of Florida's 20 major population centers, 15 are located in coastal counties.[55] In 2006, Florida's coastal economy contributed $226 billion in wages and 5.8 million jobs to the state.[56] Between 2003-2006, Florida's coastal economy grew 17.5%.[57]

In addition to economic growth, Florida has experienced dramatic coastal development in recent years.[58] Between the years of 1940-1996, the state population increased 700%, from 1.8 million to 14.3 million.[59] By 2010, Florida is expected to pass New York and become the nation's third most populated state, with a projected population of 26 million by 2030.[60]

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[53] JUDITH KILDOW ET AL., NATIONAL OCEAN ECONOMICS PROGRAM, FLORIDA'S OCEAN AND COASTAL ECONOMIES REPORT 9 (2008).

[54] *Id.* at 10.

[55] *Id.* at 11-16.

[56] *Id.* at 10.

[57] *Id.*

[58] PEW OCEANS COMMISSION, *supra* note 6, at 6.

[59] *Id.*

[60] HAUSERMAN, *supra* note 52, at 3.

Tourism is vital to Florida's economy. Each year, Florida welcomes nearly 80 million visitors.[61] In 2005, nearly 86 million tourists visited Florida, making it one of the most popular travel destinations in the world.[62] Florida also ranks first in the nation for number of seasonal homes.[63] In fact, there has been significant growth in seasonal residential development in the last two decades; between 1990-2006 Florida added 237,977 seasonal homes, an increase of 57%, compared to an overall national seasonal home growth of 37%.[64]

Coastal properties are an important financial resource for the state of Florida, in significant part due to the tax revenue generated for the state from these properties.[65] In 2006, Florida's 367,000 coastal properties were valued at $181 billion, yielding $2 billion in property tax revenues.[66] Although the number of coastal properties only grew by about 10% between 2002-2006, the value of coastal parcels more than doubled.[67] This increase demonstrates the value

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[61] FLORIDA SEA GRANT COLLEGE PROGRAM, FLORIDA'S COASTAL WEALTH, *available at* http://www.flseagrant.org/about_us/strategic/setting.htm#null (last visited Sept. 21, 2009).

[62] *Id.*

[63] KILDOW, *supra* note 53, at 128.

[64] *Id.* at 128-29.

[65] *Id.* at 82-88.

[66] *Id.*

[67] *Id.* at 87.

that living on the coasts, particularly the Florida coasts, has for Floridians and Americans generally.

II. Climate Change Adversely Affects the Nation's Coasts and Threatens the Ecologic and Economic Resources of the United States

Climate change is no longer the subject of serious scientific debate. The Court recognized the significant impacts associated with climate change in its landmark 2007 decision in *Massachusetts v. EPA*.[68] As early as 1978, Congress also acknowledged climate change by enacting the National Climate Program Act of 1978[69] to "assist the Nation and the world to understand and respond to natural and man-made climate processes and their implications."[70] In 1987, Congress enacted the Global Climate Protection Act,[71] directing the Secretary of State to coordinate United States global climate change diplomacy and the Environmental Protection Agency (EPA) to develop and propose to Congress a coordinated national policy on the issue.[72] The Global Change Research Act of 1990 established a Committee on Earth and

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[68] *Mass. v. EPA*, 549 U.S. 497 (2007).

[69] Pub. L. No. 95-367, 92 Stat. 601 (1978).

[70] *Id.*

[71] Title XI of Pub. L. 100-204, 101 Stat. 1407, note following 15 U.S.C. §§ 2901.

[72] *Id.*

Environmental Sciences to coordinate a ten-year research program, directed the President to establish a U.S. Global Change Research Program, and provided for scientific assessments to analyze trends in global change every four years.[73] Climate change is a bi-partisan issue; Presidents George W. Bush and Barack Obama have both acknowledged it as a serious threat to the ecology and economy of the nation.[74]

The impacts of climate change on the coasts are both profound and complex. In *Massachusetts*, *supra*, the Court acknowledged that scientific experts have reached a strong consensus that global warming will result in sea level rise and possibly increased ferocity of hurricanes.[75] In fact, sea level rise, erosion, and increased storm intensity and frequency are all ramifications of climate change on the coasts. These three phenomena are precisely what occurred over the last two decades in Florida, prompting respondent Florida Department of Environmental Protection (DEP) to address these impacts through beach

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[73] Pub. L. No. 101-606, 104 Stat. 3096 (1990).

[74] *See* Remarks of President George W. Bush on Global Climate Change, 2001 WL 637709, at 1 (June 11, 2001) "Climate change, with its potential to impact every corner of the world, is an issue that must be addressed by the world"; *see also* Remarks of then President-elect Barack Obama, Acceptance Speech for the Presidency of the United States (Nov. 5, 2008) "we know the challenges that tomorrow will bring are the greatest of our lifetime . . . [including] a planet in peril."

[75] *Mass. v. EPA*, *supra* note 68.

renourishment. To understand how these three factors greatly contributed to the situation the DEP faced in 1995 and 2004, it is necessary to understand each individual element and how each element impacts the nation and the state of Florida.

A. What Sea Level Rise Signifies for the Coasts

The changing climate is causing sea levels to rise in two ways: warmer ocean waters take up greater volume and melting glaciers and ice fields increase the aggregate quantity of water in the oceans.[76] It is estimated that over the past century there has been a 0.1-0.2 meter (about 4-8 inch) rise in sea level, approximately 1.0-2.0 millimeters per year.[77] While these numbers may seem small, on a comprehensive scale these increases are significant: higher sea levels interact with tides and storms to create more destructive impacts on the shoreline which causes increased erosion.[78] In addition to global sea level rise, the amount of relative sea level rise experienced along different parts of the United States coasts

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[76] JOHN T. HOUGHTON ET AL., EDS, CLIMATE CHANGE 2001: THE SCIENTIFIC BASIS: CONTRIBUTION OF WORKING GROUP I TO THE THIRD ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 641-43 (2001).

[77] *Id.*

[78] DAN CAYAN ET AL., PROJECTING FUTURE SEA LEVEL RISE: A REPORT FOR CALIFORNIA CLIMATE CHANGE CENTER 18 (March 2006).

depends on the changes in elevation of the land that occur as a result of subsidence or rising.[79] Over the past 50 years, significant portions of the Atlantic coast and Gulf of Mexico coast have experienced significantly higher rates of relative sea level rise than the global average largely due to land subsidence.[80] Furthermore, according to the 4th report of the International Panel on Climate Change (IPCC), projected sea level rise by the end of the century is expected to be 0.18-0.59 meters (7-23 inches), above the 1980-1999 average sea level.[81] More recent, respected scientific studies produced since the 4th IPCC report estimate that sea level rise by the end of the century is expected to be 0.8-2.0 meters (31-79 inches), three and a half times the IPCC rate.[82]

B. What Erosion Signifies for the Coasts

Driven by rising sea levels, flooding, and powerful ocean waves, erosion wears away beaches and

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[79] U.S. GLOBAL CLIMATE CHANGE RESEARCH PROGRAM, GLOBAL CLIMATE CHANGE IMPACTS IN THE UNITED STATES 37 (2009).

[80] *Id.*

[81] NATHANIEL L. BINDOFF ET AL., OBSERVATIONS: OCEANIC CLIMATE CHANGE AND SEA LEVEL, CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS, CONTRIBUTION OF WORKING GROUP I TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 409-13 (2007).

[82] W.T. Pfeffer et al., *Kinematic Constraints on Glacier Contributions to 21st-Century Sea-Level Rise*, 321 SCIENCE 1342 (2008).

bluffs along the shorelines, undermining waterfront homes, businesses, and public facilities, eventually rendering them uninhabitable or unusable.[83] While erosion and accretion do occur as part of a natural process of the dynamic sea, rising sea levels, flooding, and increased storms cause dramatically increased erosion without increased accretion.[84] Every year, erosion of United States shorelines destroys about 1,500 homes and causes approximately $530 million in damage.[85] In fact, the Federal Emergency Management Agency (FEMA) estimates that by 2060, coastal erosion will threaten nearly 87,000 homes and other buildings in coastal areas in the nation.[86] Of those 87,000 buildings, 53,000 are on the Atlantic Coast and 13,000 are on the Gulf of Mexico.[87]

Erosion is particularly severe on the Atlantic Coast, where beaches retreat two to three feet per

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[83] THE H. JOHN HEINZ III CENTER FOR SCIENCE, ECONOMICS AND THE ENVIRONMENT, EVALUATION OF EROSION HAZARDS, REPORT BRIEF 2 (2000).

[84] *Id.* Accretion is the gradual accumulation of land by natural forces, esp. as alluvium is added to land situated on the bank of a river or on the seashore. BLACK'S LAW DICTIONARY 21 (7th ed. 1999).

[85] THE H. JOHN HEINZ III CENTER FOR SCIENCE, *supra* note 2.

[86] GARY B. GRIGGS, CALIFORNIA SEA GRANT COLLEGE PROGRAM, COASTAL CLIFF EROSION IN SAN DIEGO COUNTY (2002), *available at* http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1091&context=csgc (last visited Sept. 22, 2009).

[87] THE H. JOHN HEINZ III CENTER FOR SCIENCE, ECONOMICS AND THE ENVIRONMENT, EVALUATION OF EROSION HAZARDS SUMMARY 5 (2000).

year on average, and the Gulf Coast, where the overall annual erosion rate is six feet per year.[88] In fact, 59%, or 485 miles, of Florida's beaches are eroding.[89] Erosion is costly to both the nation and the states not only because of damage, but because of costs incurred to counteract damage. Of the 485 miles of Florida's beaches that are eroding, 192 miles are renourished beaches managed by federal entities.[90] The United States spends about $15 billion annually in federal dollars to protect beaches.[91] The federal government expended $1.1 billion in Florida alone from 1960 through 2007 on beach renourishment activities.[92] While beach renourishment does not remove the physical forces that cause erosion, it is a relied upon tool used by federal and state governments to mitigate their effects, protecting the valuable resources of the coasts.[93]

C. What Increased Storm Intensity and Frequency Signify For the Coasts

There is increasing evidence that sea level rise and warming seas increase hurricane intensity and

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[88] *Id.*

[89] KILDOW, *supra* note 53, at 60.

[90] *Id.* at 64-65.

[91] NATURAL RESEARCH COUNCIL, *supra* note 21, at 15.

[92] KILDOW, *supra* note 53, at 64-68.

[93] NATURAL RESEARCH COUNCIL, *supra* note 21, at 17.

frequency.[94] Since hurricanes need a sea-surface temperature of at least 79 degrees Fahrenheit to form, an increase of sea-surface temperatures above this threshold will result in more frequent and more intense hurricanes.[95] Reputable scientific studies demonstrate that hurricanes will become increasingly stronger as the climate warms.[96] Hurricanes threaten the environment and economy of the nation and are the costliest natural events in the United States.[97] Since 1980, there have been 70 natural disasters in the United States, 58 of which occurred since 1990.[98] Of those 70, hurricanes and tropical storms were the most frequent and most destructive.[99] These natural disasters caused over $1 billion in property damages each, with total estimated property damages

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[94] Richard A. Anthes et al., *Hurricanes and Global Warming – Potential Linkages and Consequences*, 87(5) BULLETIN OF THE AMERICAN METEOROLOGICAL SOCIETY 623-28 (2006).

[95] ELIZABETH STANTON & FRANK ACKERMAN, FLORIDA AND CLIMATE CHANGE: THE COSTS OF INACTION 17 (2007) (citing Kerry Emanuel, *Increasing Destructiveness of Tropical Cyclones over The Past 30 Years*, 436 NATURE 686-88 (2005)).

[96] Kerry Emanuel, *supra* note 95, at 686-88.

[97] Kerry Emanuel, *supra* note 95, at 686-88; *see also* U.S. GLOBAL CLIMATE CHANGE RESEARCH PROGRAM, *supra* note 79, at 37.

[98] CENTER FOR INTEGRATIVE ENVIRONMENTAL RESEARCH, THE U.S. ECONOMIC IMPACTS OF CLIMATE CHANGE AND THE COSTS OF INACTION 20 (2007), *available at* http://www.cier.umd.edu/documents/US%20Economic%20Impacts%20of%20Climate%20Change%20and%20the%20Costs%20of%20Inaction.pdf (last visited Sept. 30, 2009).

[99] *Id.*

in excess of $540 billion.[100] Hurricane property damage is greatest on the coasts where hurricanes make landfall, causing storm surge, severe beach erosion, inland flooding, and wind-related casualties for both societal and natural resources.[101] Increased storm intensity and associated storm surge are likely to be some of the most costly climate change consequences for the Southeast United States in the future.[102]

D. The Climate Change Impacts of Sea Level Rise, Erosion, and Increased Storm Intensity and Frequency Threaten the Nation

The IPCC reported that climate change will lead to changes in geophysical, biological and socio-economic systems.[103] The effects of climate change vary considerably depending on the region examined and the time scale used.[104] Reliable scientific reports predict a sea level rise range from a conservative 20 inches (0.5 meters) to upwards of 55 inches (1.4

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[100] *Id.*

[101] U.S. GLOBAL CLIMATE CHANGE RESEARCH PROGRAM, *supra* note 79, at 115.

[102] *Id.* at 114.

[103] STEPHEN H. SCHNEIDER ET AL., ASSESSING KEY VULNERABILITIES AND THE RISK FROM CLIMATE CHANGE, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY, CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT AND THE RISK FROM CLIMATE CHANGE 781 (2007).

[104] U.S. GLOBAL CHANGE RESEARCH PROGRAM, GLOBAL CLIMATE CHANGE IMPACTS IN THE UNITED STATES 13 (2009).

meters).[105] If sea level rises only 20 inches (0.5 meters) by 2100, there will be an estimated $23-170 billion in property damages to coastal properties throughout the United States.[106] If sea level rises by 35-55 inches (0.9-1.4 meters), by the year 2100 a state like Florida, whose highest point is only 345 feet above sea level, will see an annual property and revenue loss of up to $345 billion.[107] Furthermore, sea level rise will cause significant and dramatic changes to coastal landforms, such as barrier islands, beaches, dunes and marshes, as well as ecosystems, estuaries, waterways, and human populations and development in the coastal zone.[108] In the Southeast, buildings and infrastructure that were not designed to withstand the intensity of projected storm surges will see catastrophic damage.[109] Major hurricanes in the Southeast will pose a severe risk to people, public infrastructure, and personal property.[110] Ecologic harms include increased inland and coastal flooding,

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[105] CENTER FOR INTEGRATIVE ENVIRONMENTAL RESEARCH, *supra* note 98, at 8; CALIFORNIA CLIMATE CHANGE CENTER, THE IMPACTS OF SEA LEVEL RISE ON THE CALIFORNIA COAST 3 (2009).

[106] CENTER FOR INTEGRATIVE ENVIRONMENTAL RESEARCH, *supra* note 98, at 8.

[107] STANTON & ACKERMAN, *supra* note 95, at iii.

[108] U.S. GLOBAL CHANGE RESEARCH PROGRAM, *supra* note 104, at 115.

[109] U.S. GLOBAL CLIMATE CHANGE RESEARCH PROGRAM, *supra* note 79, at 114.

[110] *Id.* at 115.

increased erosion rates, wind damage to coastal forests, and wetland loss.[111]

In California vast areas of wetlands and other natural ecosystems are vulnerable to sea level rise.[112] An estimated 550 square miles, or 350,000 acres, of wetlands exist along the California coast, valued at approximately $5,000-$200,000 per acre.[113] A sea level rise of 1.4 meters (55 inches), will flood approximately 150 square miles of land immediately adjacent to current wetlands.[114]

In Florida, a 27 inch (0.7 meter) sea level rise will inundate 70% of Miami-Dade County, which houses one-tenth of Florida's current population.[115] This sea level rise will place real estate currently valued at over $130 billion, half of Florida's existing beaches, and 99% of its mangroves all under water.[116] Structures related to national security will be destroyed, including 2 nuclear reactors and 3 prisons.[117] Structures affecting the health and well-being of the citizens of Florida and the nation, including 115 solid waste disposal sites and 341 hazardous-material

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[111] *Id.*

[112] CALIFORNIA CLIMATE CHANGE CENTER, *supra* note 105, at 3.

[113] *Id.* at 3-29.

[114] *Id.* at 3.

[115] STANTON & ACKERMAN, *supra* note 95, at v.

[116] *Id.* at vi.

[117] *Id.* at vi.

cleanup sites, will be destroyed.[118] Additionally, buildings essential for everyday living in Florida will be ruined, including 37 nursing homes, 68 hospitals, 247 gas stations, 277 shopping centers, 334 public schools, and 1,025 churches, synagogues, and mosques.[119]

In Louisiana, coastal erosion threatens 25,000 miles of interstate natural gas pipelines and 3,450 miles of pipe that carry crude oil and crude oil products.[120] In 2000, Louisiana's crude oil production accounted for approximately 27% of the total United States production, roughly 600 million barrels, and its natural gas production was also 27% of that produced in the United States.[121] Erosion will cause a serious interruption in Louisiana's ability to provide oil and gas to the nation, and its ramifications will significantly impact transportation, home heating, and fueling of factories throughout the country.[122]

Sea level rise, erosion, and increased storm intensity and frequency will negatively affect both the ecology and the economy of the coasts across the nation. From New York on the East Coast to Chicago on the Great Lakes to San Francisco on the West

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[118] *Id.* at vi.

[119] STANTON & ACKERMAN, *supra* note 95, at vi.

[120] JAMES A. RICHARDSON ET AL., DEPARTMENT OF NATURAL RESOURCES STATE OF LOUISIANA, THE ECONOMIC IMPACT OF COASTAL EROSION IN LOUISIANA ON STATE, REGIONAL, AND NATIONAL ECONOMICS 22-26 (2004).

[121] *Id.*

[122] *Id.* at 34.

Coast, 14 of the 20 largest urban centers in the United States are located within 100 kilometers of the coast and are less than 10 meters, or 32 feet, above sea level.[123] In California, a 1.4 meter (55 inch), sea level rise will put 480,000 people at risk of a 100-year flood event.[124] During a 100-year flood event, critical infrastructure in California will be at risk, including nearly 140 schools, 34 police and fire stations, 55 health care facilities, more than 330 EPA-regulated hazardous waste facilities or sites, an estimated 3,500 miles of roads and highways, 280 miles of railways, 30 coastal power plants with a combined capacity of more than 10,000 megawatts, 28 wastewater treatment plants, and the San Francisco and Oakland airports.[125]

On the East Coast, hurricane property damage in the Northeast has cost an estimated $5 billion per year.[126] In Georgia, most of Interstate-95, a major north-south transportation corridor of the East Coast, lies within five miles of the coast.[127] Much of the

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[123] U.S. GLOBAL CHANGE RESEARCH PROGRAM, *supra* note 104, at 100-03.

[124] CALIFORNIA CLIMATE CHANGE CENTER, *supra* note 105, at 40.

[125] *Id.* at 2-3.

[126] CENTER FOR INTEGRATIVE ENVIRONMENTAL RESEARCH, *supra* note 27, at 15.

[127] NATIONAL CONFERENCE OF STATE LEGISLATURES, ASSESSING THE COSTS OF CLIMATE CHANGE IN, GEORGIA 1 (2008), *available at* http://www.ncsl.org/Portals/1/documents/environ/ClimateChangeGA.pdf (last visited Sept. 22, 2009).

Georgia economy depends on this interstate to transport goods, with nearly 7,000 registered interstate trucking carriers operating within the state and 12%, or $46 billion, of the state GDP, reliant on the highway.[128] In 2007, Georgia spent $1.7 billion on construction and maintenance of highways and local roads; if increased storm activity caused a 1% rise in the price of maintenance, there would be an additional $17 million cost for the transportation sector.[129]

Costs from climate change impacts are already felt across the nation. In Georgia, property damages have increased 300% from an estimated $125 million in annual losses between 1900-1940, to $500 million each year from 1960-1980.[130] Hurricane Iniki, a category 4 hurricane that hit Hawaii in 1992, caused $2 billion in property damages and required $295 million in FEMA disaster relief.[131]

In 2005, Hurricane Katrina caused upwards of $200 billion in property damage, or 1% of the national GDP, along the Gulf coast.[132] A total of 90,000 square miles, covering four states and 23 coastal counties were declared a federal disaster area following

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[128] *Id.*

[129] *Id.*

[130] *Id.* at 3.

[131] CENTER FOR INTEGRATIVE ENVIRONMENTAL RESEARCH, *supra* note 98, at 3.

[132] CENTER FOR INTEGRATIVE ENVIRONMENTAL RESEARCH, *supra* note 98, at 6.

Hurricane Katrina.[133] More than 1,700 lives were lost, 350,000 homes were destroyed and 146,000 homes were seriously damaged.[134] In addition to urban infrastructure that was damaged by the storm, 2,100 oil platforms and over 15,000 miles of pipeline were damaged.[135]

As climate change impacts increase across the nation, it is essential to react to these threats using the best tools possible.

E. States Employ a Variety of Tools to Adapt to Climate Change and Florida Chose the Strategy that Best Addressed Its Situation

States are already coping with managing shoreline change. Many states have examined multiple approaches to adapting to changing shoreline to best mitigate impacts to the environment and property. In 2006, the North Carolina Estuarine Biological and Physical Processes Work Group released a report recommending the use of land use planning, such as buffers and setbacks, and vegetation control, such as wetlands and upland plantings, as erosion mitigation

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[133] *Id.*

[134] *Id.*

[135] *Id.*

options for much of its estuarine shoreline.[136] These recommendations are currently being used to update state estuarine shoreline stabilization rules.[137] In Massachusetts, a Coastal Hazards Commission drafted recommendations related to coastal hazards information, policy, planning and regulations, shoreline protection, and infrastructure.[138] Recommendations included implementing a program of regional sand management through policies, regulations, and activities that promote nourishment as the preferred alternative for coastal hazard protection.[139] Florida has recognized beach renourishment as a tool to protect not only its developed shore, but also the natural shore, rebuilding habitat lost from erosion.[140] Given the challenges facing coastal communities, the use of a variety of tools is necessary to plan for and

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[136] NORTH CAROLINA DIVISION OF COASTAL MANAGEMENT, THE NORTH CAROLINA ESTUARINE BIOLOGICAL AND PHYSICAL PROCESSES WORK GROUP, RECOMMENDATION FOR APPROPRIATE SHORELINE STABILIZATION METHODS FOR THE DIFFERENT NORTH CAROLINA ESTUARINE SHORELINE TYPES 1-4 (2006), *available at* http://www.nccoastalmanagement.net/Hazards/EWG%20Final%20Report%20082106.pdf (last visited Oct. 1, 2009).

[137] *Id.*

[138] MASSACHUSETTS COASTAL HAZARDS COMMISSION, PREPARING FOR THE STORM: RECOMMENDATIONS FOR MANAGEMENT OF RISK FROM COASTAL HAZARDS IN MASSACHUSETTS 1-40 (2007).

[139] *Id.* at 20.

[140] C.L. Montague, *Recovering the Sand Deficit on Florida's Atlantic Coast: A Reevaluation of Beach Nourishment as an Essential Tool for Ecological Conservation*, 24 JOURNAL OF COASTAL RESEARCH 899-916 (2008).

maintain safer shorelines. States are uniquely equipped with the knowledge of their individual shorelines to best decide the tools that work in their respective states to maintain the environmental and economic resource of the coasts.

III. States are Entrusted with Management of the Nation's Coasts and Florida Properly Acted to Protect Its Citizens and the Nation as a Whole

Florida's 825 miles of sandy beaches fronting on the Atlantic Ocean and Gulf of Mexico have been repeatedly damaged by hurricanes and tropical storms.[141] The City of Destin and Walton County Beach, located in the western Panhandle of Florida near Pensacola, include within their borders one of the finest white sand beaches in the state.[142] The beach was severely damaged in 1995 by Hurricane Opal, a category 4 hurricane, and again by Hurricane Ivan, a category 3 hurricane, in 2004.[143] Both

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[141] J.A. 73.

[142] J.A. 133.

[143] MARK LEADON ET AL., BUREAU OF BEACHES AND COASTAL SYSTEMS DEPARTMENT OF ENVIRONMENTAL PROTECTION STATE OF FLORIDA, HURRICANE OPAL, BEACH AND DUNE EROSION AND STRUCTURAL DAMAGE ALONG THE PANHANDLE COAST OF FLORIDA (1998), *available at* http://bcs.dep.state.fl.us/reports/opal-rpt.pdf (last visited Oct. 1, 2009); BUREAU OF BEACHES AND COASTAL SYSTEMS DEPARTMENT OF ENVIRONMENTAL PROTECTION STATE OF FLORIDA, HURRICANE IVAN (2004), *available at* http://bcs.dep.state.fl.us/reports/ivan.pdf (last visited Oct. 1, 2009).

Hurricane Opal and Hurricane Ivan caused severe erosion to the City of Destin and Walton County beach, causing great damage to the beach, dunes, and building structures along the coast.[144]

A. States have a Vital, Sovereign Interest in Maintaining Their Coastlines

As Justice Brandeis stated, "[t]he character of the state's ownership in the land and in the waters is a full proprietary right."[145] In most states, "not only does the State hold title to this land in *jus privatum*, it holds it in *jus publicum*, in trust for the benefit of all the citizens of this State."[146] Furthermore, "[a]s sovereigns, the States hold the intertidal lands in trust for the public and 'have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit.'"[147] Longstanding caselaw demonstrates that the nature of riparian rights and the effect of erosion and accretion on riparian lands are primarily issues of state law.[148] Specifically, states generally decide

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[144] *Id.*

[145] *Port of Seattle v. Oregon & W.R. Co.*, 255 U.S. 56, 63 (1921).

[146] *State v. Pacific Guano Co.*, 22 S.C. 50, 84 (1884).

[147] *Opinion of the Justices*, 139 N.H. 82, 88 (1994) (citing *Phillips Petroleum Co. v. Miss.*, *supra* note 4, at 475; *see also Mass. v. EPA*, *supra* note 68.

[148] *See e.g. City of St. Louis v. Rutz*, 138 U.S. 226, 250 (1891) (rights with respect to accretion or reliction are governed by the

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whether and to what extent riparian rights exist in public water bodies if such rights exist at all.[149] In the 1870 case of *Steven v. Paterson & N.R. Co.*, the New Jersey Supreme Court found that as the owner of the land outshore of mean high water, the state can allow someone other than the upland landowner to use the land outshore of the mean high water without compensation to the upland owner.[150] In fact, in some states, such rights are considered a mere franchise or license subject to revocation.[151] As such, the right of a sovereign to determine the extent of its common law with respect to issues such as riparian rights should be preserved.

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law of the state). The term riparian applies to waterfront property owners along a river or stream, whereas the term littoral applies to waterfront owners abutting an ocean, sea, or lake. However, cases and statutes "have used 'riparian owner' to broadly describe all waterfront owners." *Save our Beaches*, 31 Fla. L. Weekly at D1176 (citing *Bd. of Trs. of the Int. Imp. Trust Fund v. Sand Key Assocs., Ltd.*, 512 So.2d 934, 936 (Fla.1987)). In fact, the Florida Beach and Shore Preservation Act, FLA. STAT. 161.011-161.45 (2005)), uses the term riparian to encompass all waterfront property owners' rights.

[149] *Federal Power Comm. v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 252 (1954) ("Riparian water rights, like other real property rights, are determined by state law.").

[150] *Steven v. Paterson & N.R. Co.*, 34 NJL 532 (E & A 1870).

[151] *See Port Clinton Assocs. v. Bd. of Selectmen of Town of Clinton*, 217 Conn. 588, 597; 587 A.2d 126, 132 (1991) (stating that although riparian rights are properly rights, they are so limited by superior public rights that they are often referred to as a mere "franchise"); *see also Miss. State Highway Comm'n v. Gilich*, 609 So.2d 367, 375 (1992) (stating that riparian rights are revocable).

In addition, the ability of a state to make decisions regarding the management of its coast has been widely recognized, even when state activities impact private owners. For instance, this Court has held, in a case where state-granted tideland was filled resulting in cutting off water access to the littoral owner, that as long as the state action is compatible with the purposes for which it owns the land, the state could dispose of its tidelands free from any easement of the upland proprietor.[152]

State courts have found that the public interest can supersede private interests in shoreline areas when properly invoked, even where littoral owners are deprived of direct access to the water. In 1854, for example, the California Supreme Court determined the state had a right to fill in the San Francisco waterfront, separating littoral owners from the water by docks and other structures built on tidelands in front of their properties.[153] In Massachusetts in 1909, a state river basin commission constructed a dam and lock on the Charles River and filled a strip of submerged land in front of a riparian homeowner's property, creating a public park on the new land.[154]

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[152] *United States v. Mission Rock Co.*, 189 U.S. 391, 405, 407 (1903) (citing *Shively v. Bowlby*, 152 U.S. 1 (1894)).

[153] *Eldridge v. Cowell*, 4 Cal. 80 (1854).

[154] *Home for Aged Women v. Commonwealth*, 202 Mass. 422, (1909). *See also Carpenter v. City of Santa Monica*, 63 Cal. App. 2d 772, 789 (1944) ("tide lands . . . filled rapidly and not gradually and imperceptibly, belong to the state . . . and do not belong to the upland owner"); *Bentz v. McDaniel*, 872 So.2d 978, 980 (Dist. Ct.

(Continued on following page)

When the homeowner sued, citing an infringement of riparian rights, the court denied the claim, holding that "the waters and the land under them beyond the line of private ownership are held by the state, both as the owner of the fee and as the repository of sovereign power, with a perfect right of control in the interest of the public. The right of the Legislature . . . has been treated as paramount to all private rights. . . ."[155]

As sovereigns, states have exercised this responsibility for over a century. Finding against Florida would disturb the settled law of state authority to manage coastal lands and potentially subject millions of acres of coastal lands to uncertainty, unsafe conditions, and litigation.

App. FL 2004) ("Filling is not a gradual and imperceptible process which would qualify as a natural accretion.").

[155] *Home for Aged Women, supra* note, at 427. The Supreme Judicial Court of Massachusetts later distinguished the *Home for Aged Women* on the ground that the park was part of a larger project for improving navigation, and that the state holds the land beneath navigable waters for the limited purpose of protecting navigation and fisheries. *Michaelson v. Silver Beach*, 173 N.E.2d 273 (1961), at 277. Definition and scope of state proprietorship varies, but this Court has interpreted state's ownership of tidelands more broadly to include commerce. *See Mission Rock Co.*, 189 U.S. at 405.

B. Florida Justly Applied Its Beach and Shore Preservation Act to Maintain Its State Interest and the Interests of the Nation as a Whole

Nearly a half century ago, the Florida Legislature recognized the importance and volatility of Florida's beaches and enacted the Beach and Shore Preservation Act (Act).[156] In the Act, the Legislature determined that the erosion of Florida beaches was a "serious menace" to the economy and general welfare of Florida's inhabitants.[157] In fact, the Legislature declared it "a necessary governmental responsibility to properly manage and protect Florida's beaches . . . from erosion."[158] Furthermore, the Legislature delegated to the DEP the authority to identify critically eroded beaches and determine whether they were in need of restoration and nourishment.[159] A 1970 amendment to the Act allows for a Board of Trustees to survey, establish, and record a fixed boundary line, called the Erosion Control Line (ECL), between state sovereign lands and upland properties in the area where the restoration will occur. Under the Florida Administrative Code, "critically eroded shoreline" is

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[156] Ch. 61-246, § 1, Laws of Fla. (codified at §§ 161.011-161.45, FLA. STAT. (2005)).

[157] Ch. 61-246, § 1, Laws of Fla. (codified at §§ 161.088, FLA. STAT. (2005)).

[158] *Id.*

[159] Ch. 61-246, § 1, Laws of Fla. (codified at §§ 161.101(1), FLA. STAT. (2005)).

defined as a segment of shoreline where natural processes or human activities have caused, or contributed to, erosion and recession of the beach and dune system to such a degree that upland development, recreational interests, wildlife habitat or important cultural resources are threatened or lost.[160]

In 1995 and 2004, Florida was faced with a problem associated with meteorological forces related to climate change – forces that the entire nation will soon confront. Rising seas, erosion, and increased storm intensity caused a crisis in the City of Destin and Walton County. The DEP examined the threats to the state of Florida, and decided, within its statutory authority – and in light of its responsibilities to maintain its beaches for the public – that beach renourishment was the proper solution to best protecting the public interest in its shores. Carefully following the procedures set forth in the Act and in effect for decades, the DEP reasonably determined that a focused beach renourishment program was the optimum means of restoring and protecting the Florida coast. Florida, like all states in the Union, has the right as a sovereign to maintain the beauty, access, and future prosperity of its coasts. This responsibility relies upon the state's longstanding and well-established ability to select the management tools that best respond to its environmental, economic, and societal challenges.

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[160] FLA. ADMIN. CODE R. 62B-36.002(4).

Roman law declared millennia ago, "truly by natural right, these be common to all; the air, running water, and the sea, and hence the shores of the sea."[161] So, too, should this Court, preserve and uphold one of the most basic rights and responsibilities of sovereign states: to protect their citizens, public welfare, and the sovereign resources they manage.

CONCLUSION

For the foregoing reasons, the decision of the Florida Supreme Court below should be affirmed.

Respectfully submitted,

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[161] INSTITUTES OF JUSTINIAN, LIBER 2, TRACT 1, SECTION 1, reprinted in J.K. Angell, A TREATISE ON TIDE WATER 16 (1826).

AMICUS CURIAE BRIEF

Supreme Court, U.S.
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No. 08-1151

In the
Supreme Court of the United States

STOP THE BEACH RENOURISHMENT, INC.,
Petitioner,

v.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, ET AL.,
Respondents.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF THE EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Eagle Forum Education and Legal Defense Fund ("Eagle Forum ELDF") is an Illinois nonprofit corporation founded in 1981. For over twenty years it has defended principles of limited government, individual liberty, and private property. To ensure the guarantees of individual liberty enshrined in our written Constitution, Eagle Forum ELDF advocates fidelity to the text of the Constitution. Eagle Forum ELDF has a longstanding interest in defending private property rights, which are expressly protected by the Fifth and Fourteenth Amendments to the Constitution.

INTRODUCTION AND SUMMARY OF ARGUMENT

The protection of private property is one of the great blessings of civil society and was a motivating force behind the design of the United States Constitution. In keeping with a principle deeply rooted in common and natural law, the Fifth Amendment to the United States Constitution protects property owners from uncompensated takings of their private property, regardless of whether the taking occurs at the hands of a legislature, an executive, or a court. The text and history of the Fifth Amendment—and its subsequent

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[1] This brief is filed with the written consent of all parties. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

incorporation against the states through the Fourteenth Amendment—make clear that a taking has occurred where, as here, a court decision physically deprives an owner of real property in a manner that is inconsistent with fundamental property rights that have been recognized since the Founding. Although state courts and legislatures retain the power to alter their laws regulating property rights, that power is subject to constitutional limitations. The constitutional term "property" is not simply an elastic word that the states are free to redefine at will. In particular, states cannot abolish longstanding property rights without paying just compensation.

Here, the Florida Legislature passed a law empowering local governments to sever a beachfront property owner's contact with the water by fixing what had previously been a dynamic property boundary—the mean high water line—in place, and by dumping sand seaward of the new property line to create a public beach between the owner's (now landlocked) property and the water. In the decision below, the Florida Supreme Court held that no compensation was due for this physical invasion of the owners' property because the rights the owners asserted did not exist in the first place. The court suggested that Florida case law had rarely described "the exact nature" of littoral property rights "in detail." Pet. App. 18. Under the guise of supplying that missing "detail," the court proceeded to define out of existence fundamental property rights recognized by more than a century of common law and tradition.

To hold that a state government may evade the limitations of the Takings Clause by doing through

judicial fiat what it clearly may not do through executive action or legislation would be inconsistent with the text and history of the Takings Clause and would prevent its meaningful enforcement. The Florida Supreme Court's decision should be reversed.

ARGUMENT

I. THE TEXT AND HISTORY OF THE TAKINGS CLAUSE MAKE CLEAR THAT THE JUDICIARY IS NOT EXCLUDED FROM ITS REACH.

Section 1 of the Fourteenth Amendment to the United States Constitution provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." This Court has held that this provision specifically incorporates the Fifth Amendment's Takings Clause against the states. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897).

1. The Fifth Amendment, in turn, provides that private property shall not be taken for public use "without just compensation":

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence

> to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. In deciding whether that provision applies here, the Court must ascertain its "normal and ordinary" meaning. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2788 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)). The normal and ordinary meaning of the Takings Clause is not limited to any specific mechanism of taking property, nor is it confined to any specific branch or instrumentality of government. It is written in the passive voice and states simply that just compensation is required whenever "private property" is "taken for public use." That broad language is in contrast to other provisions of the Bill of Rights directed at specific governmental actors. The First Amendment, for example, begins with "Congress shall make no law," and the Sixth and Seventh Amendments are plainly directed at the conduct of court proceedings.

3. Contemporaneous dictionaries and usage confirm that the Eighteenth- and Nineteenth-Century meanings of "private," "property," and "taken" are similar to the modern meanings and that even the narrowest conception of "private property" being "taken" covers confiscation of land of the type that occurred in this case. "Private" meant personal, individual, and essentially non-public. 2 Samuel Johnson, A DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1773) ("Particular; not relating to the

publick"); Noah Webster, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (reprinted 1989) [*hereinafter* Webster 1828] ("Individual; personal; in contradistinction from public or national").

"Property" had a broad range of meanings and was used by the founders in different ways. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 826-27 (1995). For example, in a 1792 essay entitled *Property*, James Madison distinguished between property "in its particular application" and in "its larger and juster meaning." James Madison, *Property*, NAT'L GAZETTE, Mar. 29, 1792, *reprinted in* James Madison, WRITINGS 515 (Jack N. Rakove ed., 1999) [hereinafter Madison, WRITINGS]. The narrower definition was "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual"; the broader definition included other civil rights. *Id.* Webster's 1828 dictionary defined property as "[t]he exclusive right of possessing, enjoying and disposing of a thing," and "[t]he thing owned; that to which a person has the legal title, whether in his possession or not." Webster added that "the foundation of man's property in the earth and in all its productions" came from "the beginning of the world," when "the Creator gave to man dominion over the earth," and that "It is one of the greatest blessings of civil society that the property of citizens is well secured." Webster 1828; *see also* 2 Timothy Cunningham, A NEW AND COMPLETE LAW DICTIONARY (2d ed. 1771) ("Property is the highest right that a man hath, or can have to any thing, and no ways depending upon

another man's courtesy."); 2 Johnson ("[r]ight of possession" or "possession held in one's own right").

"Take" had numerous meanings, just as it does now, and in relation to property it referred broadly to possession, often to the exclusion of another. Webster's first definition of "take" is "[i]n a general sense, to get hold or gain possession of a thing *in almost any manner*, either by receiving it when offered, or by using exertion to obtain it." Other definitions include "To take from, to deprive of ... to detract; to derogate." Webster 1828 (emphasis added). *See also* 2 Johnson ("To seize what is not given"; "11. To exact"; "12. To get; to have; to appropriate"; "48. To separate for one's self from any quantity; to remove for one's self from any place."; "65. *To* TAKE *away*. To deprive of.") (original emphasis).

The natural and ordinary reading of the words "nor shall private property be taken" therefore connotes a broad prohibition against depriving an owner of something he possesses and is not limited to acts of the legislature or the executive. A contrary interpretation would require the Court to add limitations to this broad language that it does not contain, thereby violating well-settled principles of constitutional construction. *See, e.g.*, *Heller*, 128 S. Ct. at 2821 ("Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope to broad."). Essentially, respondents would have the Court read this provision as stating "nor shall private property be taken by the Legislature or by the Executive."

4. Such an interpretation would be entirely inimical to the understanding of fundamental rights shared by the founding generation. The founders recognized "property" as a fundamental, pre-political right, and the protection of property as one of the core functions of government. The right to security in one's property was confirmed in the Magna Carta, in a provision that resembles the Fifth Amendment's Due Process Clause. MAGNA CARTA § 29 (1297) ("No freeman is to be ... disseised of his free tenement ... save by lawful judgment of his peers of by the law of the land."). As Blackstone explained, property was the "third absolute right, inherent in every Englishman" (the other two being life and liberty). 1 William Blackstone, COMMENTARIES *138. John Locke observed that the very purpose of civilized society, and the reason why one would leave the "State of Nature," was "the mutual *Preservation* of . . . Lives, Liberties and Estates, which I call by the general Name, *Property*." John Locke, TWO TREATISES ON GOVERNMENT 350 (Peter Laslett ed., 1988) (1690).

The principle that just compensation was required whenever a government took private property was "deeply embedded in both the common law and natural law traditions." Michael W. McConnell, *Contract Rights and Property Rights*, 76 CAL. L. REV. 267, 281 (1988) (citing Blackstone, Grotius, Pufendorf, Burlamaqui, Vattel and Van Bynershoek); *see also* Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 54-55 (1964) (similar, citing same authorities); *VanHorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (C.C.D. Pa. 1795) (invoking natural and positive law reasoning in support of its holding that the state legislature could

not pass legislation transferring property from one citizen to another without just compensation: "It is inconsistent with principles of reason, justice, and moral rectitude; it is incompatible with the comfort, peace, and happiness of mankind; it is contrary to the principles of social alliance in every free government; and lastly, it is contrary to both the letter and spirit of the Constitution.").

5. Those common and natural law principles were central to the political theory implemented by the founders in the Constitution. Scholars have observed that Blackstone and Locke, in particular, had an enormous degree of influence on the founders. *See, e.g.*, Richard A. Epstein, TAKINGS 29 (1985) ("It is very clear that the founders shared Locke's and Blackstone's affection for private property, which is why they inserted the eminent domain provision in the Bill of Rights."); James W. Ely, Jr., *Economic Liberties and the Original Meaning of the Constitution*, 45 SAN DIEGO L. REV. 673, 703 (2008) (noting the influence of Locke). "Critics as well as admirers observe that the American constitutional scheme was designed, in large part, for the protection of private property. . . . The protection of private property was a nearly unanimous intention among the founding generation." McConnell, 76 CAL. L. REV. at 270.

For example, while debating apportionment of representation in the legislature, Gouverneur Morris argued that property should be taken into account, as property was "the main object" of society and government. James Madison, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 211-2 (Gaillard Hunt & James Brown Scott, eds.

1920) (1787). Echoing Locke's arguments, Morris stated that "[t]he savage State ... was only renounced for the sake of property which could only be secured by the restraints of regular government." *Id.* at 212. John Rutledge spoke up immediately afterward, to register his agreement with Morris that "Property was certainly the principal object of Society." *Id.*; *see also id.* at 215 ("[P]roperty was the only just measure of representation ... the great object of Govern[ment];the great cause of war; the means of carrying it on." (quoting Pierce Butler)); 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 302 (Max Farrand rev. ed. 1966) ("One great objt. of Govt. is personal protection and the security of Property." (quoting Alexander Hamilton)).

6. Moreover, the founding generation specifically recognized that courts could deprive individuals of property, just as the legislature of executive. For example, the *Essex Result*, a critique of the proposed Massachusetts Constitution of 1778, and an influential document in the later drafting of the United States Constitution,[2] warned more generally of the threat to property rights that would result from the combination of the judicial power with the executive:

> [T]he subject would then have no permanent security of his person and property. The executive power would

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[2] The *Essex Result* is described as "the first clear formulation of the theory [of separation of powers] which was to become the basis of the Federal Constitution." *See* M.J.C. Vile, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 150 (1967).

> interpret the laws and bend them to his will; and, as he is the judge, he may leap over them by artful constructions, and gratify, with impunity, the most rapacious passions

Essex Result (1778), *reprinted in* Theophilus Parsons, MEMOIR OF THEOPHILUS PARSONS 359, 374 (1859). Similar dangers would result from the combination of the legislative and judicial powers, the *Essex Result* warned, as judges could make retrospective laws with impunity. *Id.* at 373-74.

7. The drafting history of the Fifth Amendment confirms that the Takings Clause was designed to guard against a range of potential misdeeds that could be committed by any branch of the government, including the courts. The Takings Clause was drafted by James Madison and is the only provision of the Bill of Rights not proposed by any state. Treanor, 95 COLUM. L. REV. at 791 (citing Edward Dumbauld, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 161-63 (1957)); Douglas W. Kmiec, *The Coherence of the Natural Law of Property*, 26 VAL. U. L. REV. 367 (1991) (same, citing Dumbauld). Madison's *Federalist No. 10* explains his view that "factions"—particularly those created by the unequal distribution of property—had great potential to destabilize governments and that the United States government should be structured as a republic rather than a democracy so as "to break and control the violence of faction." THE FEDERALIST NO. 10, at 77, 79 (James Madison) (Clinton Rossiter ed., 1961).

Madison's writings reflect two overarching concerns embodied in the Takings Clause: (1) the desire to have an explicit bar against uncompensated

takings by the federal government, and (2) the desire to make a strong and explicit statement of national intent to respect property rights that would educate the public and would give future majorities pause before they violated property rights. *See* William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 710-12 (1985).

In his speech introducing the proposed Bill of Rights to Congress, Madison explained that a written Bill of Rights was desirable because, despite structural protections written into the Constitution, the potential for abuse of power still remained. 1 ANNALS OF CONG. 431, 437 (1789). The greatest danger, he stated, was "in the body of the people, operating by the majority against the minority." *Id.* As a further safeguard against that danger, Madison argued, "paper barriers" against certain abuses might inspire respect:

> It may be thought that all paper barriers against the power of the community are too weak to be worthy of attention. . . . [Y]et, as they have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community, it may be one means to control the majority from those acts to which they might be otherwise inclined.

Id. In his essay *Property*, Madison reflected a similar sentiment and directly invoked the Takings Clause. In *Property*, Madison argued that the United States government might take pride in its

commitment to property reflected in the Takings Clause, but cautioned that the government would dishonor its commitment to respect property rights if it did not also honor a broader range of liberties such as freedom of speech and conscience. Madison, WRITINGS 517; *see also* Treanor, 94 YALE L.J. at 712-13. The historical record thus evinces a clear intent to provide the broadest possible protection of private property rights from government encroachment.

8. Early Nineteenth-Century experience confirms that the understanding of property as a natural, fundamental, pre-political right survived well past the founding. Commenting on the Takings Clause, in 1833, Joseph Story observed that it "is an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down by jurists as a principle of universal law." 3 Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1784 (1833) *See also* 2 James Kent, COMMENTARIES ON AMERICAN LAW 256 (1827) ("The right of property, founded on occupancy, is suggested to the human mind, by feeling and reason, prior to the influence of positive institutions."). Without security in one's property, Story recognized, "almost all other rights would become utterly worthless." 3 Story § 1784; *see also id.* ("[H]ow vain it would be to speak of [good government] when all property is subject to the will or caprice of the legislature, and the rulers.").

9. Moreover, the Takings Clause was influential in the Nineteenth Century in promoting respect for property rights. "It inculcated the belief that an uncompensated taking was a violation of a fundamental right." Treanor, 94 YALE L.J. at 714-5;

see also William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 572-3 (1972) (similar). In some states that did not yet have takings clauses, courts judicially imposed the requirement of just compensation. Stoebuck, 47 WASH. L. REV. at 573 & nn. 65-66. Most decisions imposed the requirement on the basis of natural law principles, *see, e.g.*, *Gardner v. Trustees of the Village of Newburgh*, 2 Johns. Ch. 162, 167 (N.Y. Ch. 1816); *Young v. McKenzie*, 3 Ga. 31, 1847 WL 1302 at *8-10 (1847). States also began to add takings clauses to their own constitutions. By the 1820s, the principle of just compensation had won general acceptance, Treanor, 94 YALE L.J. at 714, and by the time of the Civil War, every state but North Carolina had a Takings Clause. 1 Julius L. Sackman, NICHOLS ON EMINENT DOMAIN § 1.3 (3d ed. 2006) (listing provisions).

10. Nineteenth-Century experience also demonstrates that there was nothing inconsistent or anomalous about the notion of a court "taking" property within the meaning of the Fifth Amendment. Indeed, there is a long tradition in this country of state courts exercising powers of eminent domain and ordering just compensation for takings of private property where warranted. In Tennessee, for example, if one person's land was enclosed by the land of another and he was not allowed to enter and exit his property through the latter's land, a statute allowed the enclosed landowner to apply to the courts for an order opening a public road through the latter's property. *Bashor v. Bowman*, 180 S.W. 326, 326 (Tenn. 1915). Applying a similar, though more open-ended statute, not premised on the applicant's land being enclosed, the Supreme Court of

Tennessee in 1858 rejected a private application for a highway running through the land of another private party. *McWhirter v. Cockrell*, 39 Tenn. 9, 1858 WL 2976 (1858). In the course of doing so, the court weighed the costs and benefits of the proposed road and acknowledged the duty of paying just compensation to the owners should it approve the highway:

> The public is entitled to all necessary roads and thoroughfares, and *it is the duty of the courts to grant them*, whenever they are needed, although they may be injurious to individuals, upon making compensation for the injury, as provided by law. . . . The advantage to the public must be sufficiently great to overbalance the private injury. . . . In the exercise of this very delicate and important jurisdiction, by which private property is taken for public use, *the courts should look, carefully, to the interests of all the citizens, and never exercise the right of eminent domain unless it is clearly and urgently demanded for the public good.*

Id. 1858 WL 2976 at *1 (emphases added).

11. When the Fourteenth Amendment was enacted, the meaning of the language in the Takings Clause was the same as in 1791 and, if anything, the value of security in one's property had gained even greater importance. The drafters of the Fourteenth Amendment were particularly concerned with the failure of Southern states to honor the property

rights of newly freed former slaves. Michael Kent Curtis, *The Fourteenth Amendment: Recalling What the Court Forgot*, 56 DRAKE L. REV. 911, 917 (2008). Late Nineteenth Century dictionaries confirm that the words "private," "property," and "taken" had essentially the same meanings as they do now and as they did in 1791. *See* Noah Webster, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 1039 (1864) ("private" defined to include "Belonging to, or concerning an individual . . . not public"); *id.* at 1048 ("property" defined to include "that which belongs exclusively to an individual; that to which a person has a legal title, whether in his possession or not; thing owned"); *id.* at 1349 ("take" defined to include "to get the custody or control of; to reduce to one's power or will"). Indeed, the first edition of Black's law dictionary refers the Takings Clause in its definitions of "private property" and "take." "Private property" is defined as "*protected from being taken for public uses*, is such property as belongs absolutely to an individual . . . capable of being had in possession and transmitted to another, such as houses, lands and chattels." Henry Campbell Black, DICTIONARY OF LAW CONTAINING DEFINITIONS OF THE TERMS AND PHRASES OF AMERICAN AND ENGLISH JURISPRUDENCE, ANCIENT AND MODERN 940 (1891) (emphasis added). "Take" is defined with more direct reference to the Takings Clause:

> 1. To lay hold of; to gain or receive into possession; to seize; to deprive one of the possession of to assume ownership. Thus, it is a constitutional provision that a man's property shall not be *taken* for public uses without just compensation.

Id. at 1150 (original emphasis). The words of Section 1 of the Fourteenth Amendment, like the Fifth Amendment, are not limited to any specific mechanism of taking property; nor are they confined to any specific branch or instrumentality of government. *See, e.g., Virginia v. Rives*, 100 U.S. 313, 318 (1879); *Chicago, Burlington & Quincy R.R. Co.*, 166 U.S. at 233-34. There is no basis in the text and history of either Amendment to conclude otherwise.

II. To Allow the Decision Below to Stand Would Be Inconsistent With the Text and History of the Takings Clause, and Would Prevent its Meaningful Enforcement.

1. The Florida Supreme Court's decision is flatly inconsistent with this text and history. While the details of "private property" may be regulated by state law, including by the state courts, there is a "constitutionally mandated minimum" of property that states are not free to define out of existence. *See* Douglas W. Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak Nor Obtuse*, 88 Colum. L. Rev. 1630, 1642 (1988). As Justice Thurgood Marshall observed, this Court's cases do not stand for the proposition that "private property" is an empty or elastic term left entirely up to the states to define:

> I do not understand the Court to suggest that rights of property are to be defined solely by state law, or that there is no federal constitutional barrier to the abrogation of common-law rights by Congress or a state government. The constitutional terms

> "life, liberty, and property" do not derive their meaning solely from the provisions of positive law.

PruneYard Shopping Center v. Robins, 447 U.S. 74, 93 (1980) (Marshall, J., concurring); *see also Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) ("[A] State, by *ipse dixit*, may not transform private property into public without compensation."). Rather, there are certain core, fundamental, and inalienable rights that were understood traditionally to accompany property ownership.

2. It is exactly those fundamental rights that are under attack here. As the petitioner's brief explains, for more than 100 years the owners of littoral property in Florida had a reasonable expectation, recognized by law, in their rights of accretion and contact with the water that come with having the Mean High Water Line as one of their property boundaries. Petitioner's Br. at 20-34.

3. Those fundamental rights were not merely recognized under Florida law, but were based on centuries-old common law understandings of the rights of owners of littoral property. Indeed, contact with the water is inherent in the meaning of the term "littoral." Thus, for example, Webster's 1828 dictionary and Samuel Johnson's 1773 dictionary both define littoral as "*belonging* to a shore." Webster 1828 (emphasis added); 2 Johnson ("belonging to the shore"). As Blackstone explained more than two centuries ago, the common law recognized the right of accretion as a fundamental right inhering in such property:

> [A]s to lands gained from the sea, either by alluvion, by the washing up of sand and earth, so as in time to make terra firma; or by dereliction, as when the sea shrinks back below the usual watermark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining.

2 Blackstone, at *261-62; *see also* Joseph K. Angell, TREATISE ON THE RIGHT OF PROPERTY IN TIDE WATERS AND IN THE SOIL AND SHORES THEREOF 249-50 (2d ed. 1847) (explaining the right of accretion and tracing its origins to Roman, French, Spanish, and Louisiana jurisprudence and to the English common law); Webster 1828 (defining "alluvion" and "alluvium" to include a statement that "[t]he owner of the land thus augmented has a right to the alluvial earth").

4. Petitioner's members thus have a fundamental right long recognized under the Nation's history and traditions to a dynamic property boundary that permits natural expansion ("accretion") of the property through the action of the tides. The Florida government has fixed the boundary in place and deprived petitioner's members of their rights to contact with the water and to the dynamic parcel of land that would otherwise result from accretion. They have had "private property" "taken" from them through a physical invasion just as surely as the property owners in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982).

5. To allow Florida to evade the Takings Clause by acting through its courts would prevent the meaningful enforcement of the Takings Clause. It is settled law that when a state "takes" "private property," it must pay just compensation. *See, e.g., Webb's Fabulous Pharmacies*, 449 U.S. at 160. There is simply no question that the State's action here would constitute a taking of private property requiring compensation if it were accomplished by the executive or by the legislature.

6. To say that the Takings Clause applies to the actions of courts does *not* mean, however, that the Fifth Amendment would apply in every case in which the courts adjudicated competing property rights—only where the courts dispense with a fundamental right of private property. This Court has consistently recognized that a case presents a constitutional issue where, as here, a property owner alleges a taking and a state court holds that no property right existed in the first place. *Demorest v. City Bank Farmers Trust*, 321 U.S. 36, 42-43 (1944) ("Even though the constitutional protection invoked be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus evaded."); *Broad River Power Co. v. South Carolina ex rel. Daniel*, 281 U.S. 537, 540 (1930); *Fox River Paper Co. v. Railroad Comm'n of Wis.*, 274 U.S. 651, 654 (1927).

7. This Court has recognized that state governments have a variety of means at their disposal to deprive owners of their property and that "if the protection against physical appropriations of private property was to be meaningfully enforced,

the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992); *see also* Sax, 74 YALE L.J. at 46-48 (describing attempts by state governments to use formalities and indirect action to avoid the requirement of Just Compensation). In *Lucas*, the Court explained the intersection of the state's police power with the Takings Clause: the Court's "'takings' jurisprudence has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property." 505 U.S. at 1027. Property owners' rights in their property are inherently subject to some amount of regulation by the state, and owners reasonably expect this, even—in the case of some personal property—to the extent of regulation that might render the property economically worthless. *Id.* at 1027-28. Where, however, a state regulation renders a parcel of land economically worthless, the state has "taken" the property, and must be required to pay just compensation if the guarantee of the Takings Clause is to be meaningfully enforced. *Id.* at 1028.

8. The same may be said of the right of state courts to refine and reconsider their precedents. The Court has recognized in the past—in dictum and in a case where a state judiciary approved an abnormally low award of just compensation for a taking—that there is no exception in the text of the Fifth or Fourteenth Amendments for government actors who are members of the judiciary, and that reading such an exception in would render the clause

meaningless. *See, e.g.*, *Webb's Fabulous Pharmacies*, 449 U.S. at 164 ("Neither the Florida legislature by statute, nor the Florida courts by judicial decree, may accomplish [a taking] simply by recharacterizing" private property as public."); *Chicago, Burlington & Quincy R.R. Co.*, 166 U.S. at 233-34 ("[i]t must be observed that the prohibitions of the amendment refer to all the instrumentalities of the state—to its legislative, executive and judicial authorities . . . [t]his must be so, or, as we have often said, the constitutional prohibition has no meaning.").

This Court has traditionally recognized that state courts have latitude to overrule their own precedents, including those bearing on the law of property, without triggering the requirement of Just Compensation to all parties thereby aggrieved. *See, e.g.*, *Patterson v. People*, 205 U.S. 454, 461 (1907) ("[I]n general, the decision of a court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the 14th Amendment merely because it is wrong or because earlier decisions are reversed."); *Muhlker v. New York & Harlem R.R. Co.*, 197 U.S 544, 570 (1905) ("We are not called upon to discuss the power, or the limitations upon the power, or the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States."); *cf. Lucas*, 505 U.S. at 1035 ("The Takings Clause does not require a static body of state property law.") (Kennedy, J., concurring).

That latitude, however, is not boundless, nor is it a license to violate the Takings Clause. Lower courts, commentators, and some Justices of this Court have explicitly recognized as much. *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1212 (1994) (Scalia, J., dissenting from denial of certiorari) ("No more by judicial decree than by legislative fiat may a State transform private property into public property without just compensation. . . . if it cannot fairly be said that [the state court's invocation of an Oregon doctrine of custom to invalidate the petitioners' property rights], then the decision now before us has effected an uncompensated taking."); *Hughes v. Washington*, 389 U.S. 290, 296 (1967) (Stewart, J., concurring) ("To the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate."); *Robinson v. Ariyoshi*, 753 F.2d 1468, 1471 (9th Cir. 1985) (the "main question" is "[c]an the state, by a judicial decision which creates a major change in property law, divest property interests?"); Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1471 nn. 91-97 (1990) (citing state and lower federal court decisions recognizing judicial changes in the law as uncompensated takings); *see also generally* John Martinez, *Taking Time Seriously: The Federal Constitutional Right to be Free From "Startling" State Court Overrulings*, 11 HARV. J.L. & PUB. POL'Y 297 (1988). This Court's prior cases, such as *Webb's Fabulous Pharmacies* and *Chicago, Burlington & Quincy Railroad Co.*, have suggested a similar

conclusion but have not directly so held. The Court should take the opportunity to do so now.

9. Where, as here, a state court has abrogated a right inhering in private property that has stood for hundreds of years and been recognized as fundamental, the state has "taken" property and must pay just compensation. That is so whether the state accomplishes the taking through the overruling of longstanding precedent or through an unreasonable "interpretation" of prior law. This Court has described the prohibition against uncompensated takings as "the historical compact recorded in the Takings Clause that has become part of our constitutional culture." *Lucas*, 505 U.S. at 1027. As shown above, that compact by its terms forbids the action at issue here, and there is no basis in the text or history of that compact to hold otherwise.

CONCLUSION

For the reasons set forth above, the judgment of the Florida Supreme Court should be reversed.

Respectfully submitted,

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August 20, 2009

AMICUS CURIAE BRIEF

(29) B315

No. 08-1151

In The
Supreme Court of the United States

STOP THE BEACH RENOURISHMENT, INC.,

Petitioner,

v.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, ET AL.,

Respondents.

On Writ Of Certiorari To The Florida Supreme Court

BRIEF OF *AMICUS CURIAE* THE FLORIDA SHORE AND BEACH PRESERVATION ASSOCIATION, THE FLORIDA ASSOCIATION OF COUNTIES, AND THE FLORIDA LEAGUE OF CITIES IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Florida Supreme Court's resolution of questions of Florida property law in this case lacked fair support in prior Florida law.

2. Whether, assuming the Act takes littoral property rights to accretion or reliction, the Act is unconstitutional for taking property without just compensation.

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STATEMENT OF INTEREST

The *amici* have received the parties' written consent to file this *amici curiae* brief supporting Respondents.[1] The Florida Association of Counties, Inc. (FAC) was formed in 1929 to assist counties and represent the interests and concerns of Florida county governments. Every county in the state is a member of the Association. The Florida League of Cities, Inc. (FLC) was formed in 1922 to assist cities and represent the interests and concerns of Florida cities. Ninety-nine percent of Florida's 411 municipalities are members of the League, as are five charter counties. Members of the Florida Shore & Beach Preservation Association (FSBPA) have been active participants, either as local government sponsors of a project or financial contributors, in virtually every beach restoration project undertaken in Florida. Its members include private property owners, public agencies and local governments, and professionals who advocate for substantive and financial program enhancements for beach management before the Florida Legislature and Congress. FSBPA members participate in and fund research regarding beach management options and the economic, environmental and storm protection benefits of beach restoration.

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[1] Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

FSBPA, FLC, and FAC believe that the beach nourishment program in Florida effectively will be eliminated if this Court decides that the state must pay takings damages to every private property owner along a beach that the state, the federal government, or a local government attempts to restore. There is no possible way in which government can afford to condemn, or pay takings damages for, the supposed property rights associated with this case and carry out a meaningful beach restoration program.

In addition, these *amici* are concerned that due to the many Erosion Control Lines (ECLs) that already exist in the state in connection with beach restoration projects, a decision that the lines previously established are a taking of beachfront property of abutting upland property owners, will create an avalanche of takings claims against the State and local governments on completed or ongoing projects. Based simply on the transaction costs of claims for compensation, future projects would be prohibitively expensive, or miles of beaches in critical need of restoration would not be addressed. Moreover, the general public would question its support of a program which must be defended when abutting property owners file actions for monetary damages even though they most directly benefit from the expenditure of taxpayer dollars for beach restoration projects.

The outcome of this case will decide whether the beach restoration program will continue in Florida, as well as similar programs in the rest of the country.

Elimination of the beach restoration program will cause substantial economic losses to the state, beachfront communities, homeowners and businesses as a result of the loss of tourism and tax dollars. In addition, the loss or reduction of beach restoration projects will increase the exposure of upland buildings and infrastructure to the risk of catastrophic losses in the event of hurricanes and other storm events.

SUMMARY OF THE ARGUMENT

It has been suggested by the Petitioners and their *amici* in this case that the members of the Florida Supreme Court who reached the conclusion for the Court in the case at bar, have violated their solemn vows to observe and abide by the Florida Constitution and the United States Constitution, and have deliberately disregarded private property rights long recognized under the state's law of property in order to permit the state to take that private property without compensation, in violation of the Fifth Amendment. It is further urged by the Petitioners and their *amici* that this Court should decide the background principles of Florida's law of property, instead of the Florida Supreme Court, and disregard our federal system. Petitioner's suggestion is outrageous, and this Court should decline Petitioner's request to usurp the function of the Florida Supreme Court. The Florida Supreme Court's decision is based upon a fair and reasonable judicial analysis, and has

fair and substantial support in the state's prior judicial decisions. The claimed property interests allegedly taken in this case by the Florida Beach and Shore Preservation Act (the Act),[2] to wit: rights to have future accretion and land that reemerges by reliction, and a right to have the land make constant contact with the water, do not "inhere in the title to the Petitioner's property itself" under background principles of Florida's law of property. Further, given the enormous benefits that beach restoration bestows on a littoral owner and its property, such theoretical property rights, even if they did exist under Florida's law of property, are more than compensated for by the Act.

ARGUMENT

I. PUBLIC-SPONSORED BEACH RESTORATION UNDER THE PROVISIONS OF THE ACT IS CRITICALLY IMPORTANT TO THE ECONOMY AND WELFARE OF THE STATE OF FLORIDA AND ITS CITIZENS, BUT WILL CEASE IF COMPENSATION IS REQUIRED FOR THE PROPERTY INTERESTS PETITIONERS CLAIM IN THIS CASE.

Government-sponsored beach restoration, which prevents catastrophic losses to lives and property

[2] *Fla. Stat.* ch. 161, part I (2009). The specific sections of the Act in issue in this case are sections 161.191 and 161.201.

when hurricanes strike, protects and enhances littoral property values, assures that beaches are available to the public, and serves the state's and the nation's economies, is in mortal danger if this Court rules that the Florida Beach and Shore Preservation Act is unconstitutional.

Florida is known worldwide for its beaches, and beach restoration is considered vital to Florida, and critical to the state's economy. The State of Florida has 1,197 miles of coastline, and 825 miles of sandy beaches. Florida Department of Environmental Protection, Bureau of Beaches and Coastal Systems, *Strategic Beach Management Plan* (May 2008), p. 2, available at http://www.dep.state.fl.us/beaches/publications/pdf/SBMP/Cover%20and%20Introduction.pdf. Florida's coastline is subjected to powerful tropical storms and hurricanes on a regular basis. Since the Florida Department of Environmental Protection began identifying critically eroded beaches in 1986, Florida's beaches have been dramatically affected by major storms and hurricanes. *See generally,* Florida Department of Environmental Protection, *Critically Eroded Beaches in Florida* (June 2009), p. 1-3, available at http://www.dep.state.fl.us/beaches/publications/pdf/CritEroRpt09.pdf.

The catastrophic losses to beaches and beachfront property and structures caused by hurricanes and tropical storms are obvious and have been well documented by the media. Addressing these losses, and preventing them from occurring in the future, is a critical task. A 2000 report prepared by the Heinz

Center for Science, Economics, and the Environment for the Federal Emergency Management Agency, *Evaluation of Erosion Hazards* (April 2000) available at http://www.heinzctr.org/Programs/SOCW/erosion.shtml, concluded that in the next sixty years, one in four homes within 500 feet of the coast outside of major cities will fall victim to erosion if the beaches are not supported by beach restoration programs, and the effects of erosion are allowed to occur. *Id.* at 111-128. Further, during this time, erosion damage to property would average half a billion dollars annually. *Id.* at 129-130. If coastal construction of homes continues during that period, or if sea levels rise, the damage may be even higher. *Id.* at x.

Beach restoration has been the dominant beach protection policy of the State of Florida since the 1980's. Since the 1970's 203.6 miles of beach in Florida have been restored and renourished, by 61 projects. The federal government has conducted or partnered in approximately 125 of these miles of beach restoration. Presently, Florida has 396.4 miles of critically eroded beach. Local, state and federal entities are now managing over 200 miles of restored beaches in Florida. Florida Department of Environmental Protection, Beaches and Coastal Systems, *Beach Erosion Control Program* (BECP), available at http://www.dep.state.fl.us/beaches/programs/bcherosn.htm. It is estimated that the federal government contributed $680 million to beach restoration and renourishment in Florida through 2002. Significant additional federal funding was also provided for dune

construction, and as a result of the hurricane seasons of 2004 and 2005. National Oceanic and Atmospheric Administration, Coastal Services Center, *Historical Expenditures for Beach Nourishment Projects: Geographical Distribution of Projects and Sources,* available at http://www.csc.noaa.gov/beachnourishment/html/human/socio/geodist.htm.

Through the fiscal year 2006, over $582 million has been appropriated by the Florida Legislature for beach erosion control activities. http://www.dep.state.fl.us/beaches/programs/bcherosn.htm. Local governments also spend considerable sums for beach restoration and renourishment. Except for the Petitioner in this case, beach restoration has enjoyed substantial public and private support.

The reason for the support of beach restoration by littoral property owners is self evident. Because beach width reduces the strength of storm waves, beach restoration and nourishment reduce the risk of storm damage. A 1988 study of the damage due to Hurricane Eloise revealed that in areas where there is very little fronting beach, an additional 50 feet of beach width reduces by nearly half the risk of damage to structures. Robert G. Dean, *Beach Nourishment Theory and Practice,* 186-189 (World Scientific Publishing, Co. Pte. Ltd.) (2002). The economic advantages of beach nourishment on littoral property values are also significant. Two 1990's studies of restoration projects along Marco Island and Captiva Island on Florida's Gulf Coast showed typical increases in property values after restoration of

between 4 and 20 percent. W.B. Stronge, *The Economic Impact on Marco Island Beach Restoration: A Preliminary Analysis,* Proceedings, National Conference on Beach Nourishment Technology, 102-114 (1992), Florida Shore and Beach Preservation Association, Tallahassee, Florida; W.B. Stronge, *The Economics of Government Funding for Beach Nourishment Projects: The Florida Case,* 63(3) Shore and Beach 4-6 (1995). In addition, waterfront property buyers recognize that renourishment associated with beach restoration projects is a significant risk reduction against future erosion damage, and given a choice, most waterfront property buyers would prefer the house whose protection is renewed periodically, especially if the government pays for it. Warren Kriesel and Robert Friedman, *Coastal Hazards and Economic Externality: Implications for Beach Management Policies in the American Southeast,* Heinz Center for Science, Economics, and the Environment, 9 (May 2002).

Beach restoration is also important to state economies. Beaches generate income and taxes, and provide vacationing spots for people throughout the country.[3] Florida's restored beaches are enormously

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[3] Of the 62.3 million out-of-state visitors who came to Florida in 2001, a total of 22.4 million indicated that going to the beach was a primary activity during their stay in Florida. *Florida Statistical Abstract,* 2002. In 2008, Florida had more than 84 million out-of-state visitors, and it is estimated that the number will be between 97 million and 104 million by 2010. VISIT FLORIDA and Center for Economic Forecasting and

(Continued on following page)

valuable. Florida's cities and counties have spent a fortune, along with the state and federal government, on restoring and maintaining critically eroded beaches. Typically, beach improvements in Florida are funded by a combination of federal, state and local contributions. Depending on the extent of public ownership and public access, federal funds can fund up to 65 percent of the project cost, while the state funds up to 50 percent of the non-federal share. The remainder is funded by cities, counties and special districts.

FSBPA, FAC, and FLC submit that this court's decision in this case cannot be made without regard to the enormous impacts it will have on the future of beach restoration. The decision in this case will have wide-ranging effects on the future of the United States coastline and the safety of citizens who have their homes at the shore. The public contributes hugely to beach restoration projects which, it generally perceives, the benefit of which accrues in large measure to the littoral property owners. Like any government-sponsored project that entails the expenditure of large sums of public funds, public support is determinative as to whether the project will take place. If the public has to pay littoral property owners for the property rights and interests the Petitioner in this case claim the Act takes, the

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Analysis (CEFA), Florida State University. *See also* http://www.visitflorida.org/AM/Template.cfm?Section=Research_FAQ&Template=/CM/HTMLDisplay.cfm&ContentID=10909.

public will not support future beach restoration projects and the state and local governments in Florida will not choose to do them.

II. THE LAW GOVERNING THE ISSUE OF WHETHER PETITIONER'S PROPERTY HAS BEEN TAKEN BY THE ACT IS THE STATE'S LAW OF PROPERTY, AND THE FLORIDA SUPREME COURT'S DECISION IS A JUDICIALLY REASONED, PROPERLY BALANCED ANALYSIS, UNDER COMMON LAW PRINCIPLES, OF THE SPECIAL FACTORS AND RELEVANT EXISTING PRECEDENTS THAT SHOULD INFORM SUCH AN IMPORTANT JUDICIAL DECISION.

At issue in this case is what Florida's common law of property is, a matter distinctly within the purview of the Florida Supreme Court. The Constitution, court precedent, and the principles of federalism counsel for judicial restraint, and properly place the determination of the state's law of property in the hands of the state courts. It is well established law that the property rights of a riparian owner of land on navigable waters are based on the rules and decisions of the state within whose boundaries the particular land lies. *St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners*, 168 U.S. 349 (1897); *Barney v. Keokuk*, 94 U.S. 324 (1876); *Packer v. Bird*, 137 U.S. 661 (1891); *see also*, *Shively v. Bowlby*, 152 U.S. 1 (1894); *Lowndes v. Town of Huntington*, 153 U.S. 1 (1894).

The Florida Supreme Court determined that the provisions of the Act are a lawful balance between the property rights of littoral owners, the property rights of the public in littoral property, and the state's constitutional duties to preserve and protect Florida's beaches, and not to take private property without just compensation. As the Court explained, the provisions of the Act prevent loss of beaches while protecting littoral property owners from property loss. Incidental littoral property rights to access, use, navigation, and a view are not substantially or materially affected by the Act because the Act's provisions expressly preserve those rights after the restoration has been completed. "Just as with the common law, the Act facially achieves a reasonable balance of interests and rights to uniquely valuable and volatile property interests." *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So.2d 1102, 1115 (Fla. 2008) (*Walton County*).

This Court has the constitutional authority to decide what the United States Constitution means and what the federal law is. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). But since *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) it has been absolutely clear that this Court has no authority to decide for a state what a state's common law is. *See also Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (where Justice Holmes, in dissent, aptly characterizes federal court intrusion into matters of state common law as "an unconstitutional assumption of powers").

Indeed, this Court has long followed a "tradition of deference to state courts on questions of state law." *Bell v. Maryland*, 378 U.S. 226, 237 (1964). This Court has never directed what a state's common law must be. Whatever that law is, or may be, it is determined by the state judges rather than by this Court. Accordingly, this Court cannot, and frankly should not, interfere with the Florida Supreme Court's determination of the common law of property in this case.

III. THE FLORIDA SUPREME COURT'S DECISION THAT THE ACT ACCURATELY DESCRIBES THE STATE'S LAW OF LITTORAL PROPERTY, AND DOES NOT, BY ITS TERMS, TAKE PRIVATE PROPERTY WITHOUT JUST COMPENSATION, IS A FAIR JUDICIAL APPLICATION OF THE COMMON LAW AND SHOULD NOT BE DISTURBED.

A. The Florida Supreme Court followed established common law, and did not "work a sudden change in state law, unpredictable in terms of the relevant precedents," nor did it reach its decision on the law of property as a scheme to deprive persons of their private property without just compensation under the Fifth Amendment.

Petitioner and its *amici* contend that the members of the Florida Supreme Court who joined in

the majority decision in this case violated their oaths of office by invoking "non-existent rules of state substantive law" and by effecting "a sudden and unpredictable change" in the law, simply to deprive Petitioner of its members' property. Initially, those *amici* would point out that the standard used by Petitioner in expressing its claim is an incorrect standard of review to evaluate this matter, where a state's highest court has expressed the state's law and the court's decision is challenged on a federal constitutional ground. This Court has established a different, more deferential standard for such matters, which is simply whether the state supreme court's expression of the state's law rests upon a fair or substantial justification. For instance, in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992), this Court opined that state court decisions rejecting takings claims because the claimed property interest did not "inhere in the title itself, in the restrictions that background principles of the State's law of property . . . place upon land ownership," and are based upon new analysis or an extension of existing precedents, should be based on "an objectively reasonable application of relevant precedents." *Id.* at 1032, n. 18. Only when the decision is "without any fair or substantial support", *Ward v. Love County*, 253 U.S. 17, 22 (1920); *Demorest v. City Bank Farmers Trust Co.,* 321 U.S. 361 (1944), does this Court interfere with the state Court's decision. *See also Rogers v. Tennessee*, 532 U.S. 451, 468-69 (2001) (Scalia, dissenting, because the state supreme court's interpretation of the state's law was "reasonable.")

Such a standard is also appropriate given the doctrine of Our Federalism, and the recognized role and position of the state courts in society.

The Petitioner's claim is simply wrong. The Act's property provisions were not crafted in 1970 by the Florida Legislature as a means to an illegal end. On the contrary, they were enacted to state what the Legislature, based on the law at the time, understood were the respective property rights and interests of the state and the littoral property owner before and after a beach destroyed by erosion was restored. The Florida Supreme Court's decision that the Act fairly and legitimately expresses the state's law of property under such circumstances was also not a simple land grab, *ipse dixit*. There is nothing analytically, doctrinally, or intellectually dishonest about the Florida Supreme Court's judicial analysis and reasoning in this case. The court's decision on the law is a reasonable application of relevant law and common law precedents with fair, substantial support.

When Justice Scalia wrote the divided Court's decision in *Lucas v. South Carolina Coastal Council*, in 1992, the common law of property did not breathe its last breath and become only a matter of the past. When he explained that background principles of the state's law of property and nuisance law are relevant to whether there is a property interest or right that is being affected, he necessarily did so recognizing that such principles are ordinarily contained in a state's common law of property and nuisance. Likewise, he and the other Justices who joined in the opinion

surely recognized that the common law is a living body of law, which "does not work from pre-established truths of universal and inflexible validity." Benjamin Cardozo, *The Nature of the Judicial Function,* 22 (Yale University Press) (1921). On the contrary:

> The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered. It may not be modified at once, for the attempt to do absolute justice in every single case would make development and maintenance of general rules impossible; but if the rule continues to work injustice, it will eventually be reformulated. The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must be re-examined.

Munroe Smith, *Jurisprudence*, 21 (Columbia University Press) (1909).

To presume that the issuance of the Court's decision in *Lucas* marked a point in time from which any further evolution of the common law of property would be an unconstitutional violation of the Fifth Amendment is *non sequitor*. The common law is not the Constitution. While there may be philosophical debate and discussion as to the effects of time on the

latter, the common law indisputably "belongs to the living, and not the dead." Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), 15 *The Papers of Thomas Jefferson,* 392, 396 (Julian P. Boyd & William H. Gaines, Jr., eds., Princeton U. Press) (1958). In a common law system, precedents from earlier eras bind, but only to a degree. David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 Yale L. J. 1717, 1724 (2003).

B. The Florida Supreme Court performed a typical common law judicial analysis of the interests and factors informing a judicial decision in this case.

In *Shively v. Bowlby, supra,* at 26, this Court surveyed the property laws of the original states and concluded that that "there is no universal and uniform law upon the subject; but that each State has dealt with the lands under the tidewaters within its borders according to its own views of justice and policy, reserving its own control over such lands" and "the title and rights of riparian or littoral proprietors in the soil below high water mark, therefore, are governed by the laws of the several States, subject to the rights granted to the United States by the Constitution." *Id.* at 57-58. The states have continued to create and express the common law of littoral property, each according to the state's (including the state's courts') views of justice and policy, and according to the analytical framework associated with the common law.

The question answered by the Florida Supreme Court was: "On its face, does the Beach and Shore Preservation Act unconstitutionally deprive upland owners of littoral rights without just compensation?" *Walton County*, at 1105. The Court plainly limited itself to the common law on this single matter: "[W]e emphasize that our decision in this case is strictly limited to the context of restoring critically eroded beaches under the Beach and Shore Preservation Act." *Id.*

The Florida Supreme Court found that while the state's common law has developed principles that are intended to balance the interests in naturally occurring changes of the shoreline, Florida's common law has never fully considered, or addressed, how public-sponsored beach restoration affects the property interests of the public and the property interests of the upland owners. *Id.* at 1114

It is fair to say that neither Blackstone, nor Coke, nor any of the other prior writers who have expressed the common law of littoral property rights ever experienced, or been made aware of, the magnitude of force and destruction of hurricanes and tropical storms, or their striking effects on the coastlines of North America, eastern Asia, the central Pacific, and the Gulf of Mexico. Blackstone's writings on the law of avulsion was based on streams cutting or changing course, not hurricanes that carve away miles and miles of beach and destroy whole communities.

The Florida Supreme Court was not faced with a matter within the ken of Blackstone, Coke, or their British contemporaries. Nevertheless, the Florida Supreme Court used the analytical methodology that would have been used by Blackstone or Coke, and, these *amici* submit, reached conclusions that would have been worthy of all three. This case involved an analysis of competing interests: littoral property rights versus a legitimate government interest in restoring a critically eroded public beach to preserve and protect rights guaranteed under the public trust and customary use doctrines. Recognizing that "Florida's common law attempts to bring order and certainty to this dynamic boundary in a manner that reasonably balances the affected parties' interests,"[4] *id.* at 1112, the Florida Supreme Court began its constitutional and common law analysis by stating that on one side of the balancing equation is the State's "constitutional duty to protect Florida's beaches, part of which it holds in trust for public use." *Id.* at 1114. "The Beach and Shore Preservation Act

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[4] The Florida Supreme Court specifically wrote:

> These common law doctrines [erosion, reliction, accretion] reflect an attempt to balance the interests of the parties affected by inevitable changes in the shoreline. . . . While our common law has developed these specific rules that are intended to balance the interests in our ever-changing shoreline, Florida's common law has never fully addressed how public-sponsored beach restoration affects the interests of the public and the interests of the upland owners.

Walton County, at 1114.

effectuates this constitutional duty when the State is faced with critically eroded, storm-damaged beaches." *Id.* at 1115. On the other side of the equation are the property rights of littoral property owners. These are bathing, fishing, and navigation rights which littoral property owners hold in common with the public, as well as special affirmative easement rights to access to the water and use, and a negative easement right to a view, and contingent future interests to accretion and reliction. Based on these factors, the Court found that, on balance, the Act mirrored a proper common law balancing of these affected interests. *Id.* As to the impact specifically on private property interests, the Court found that "although the Act provides that the State may retain title to the newly created dry land directly adjacent to the water, upland owners may continue to access, use, and view the beach and water as they did prior to beach restoration. As a result, at least facially, there is no material or substantial impairment of these littoral rights under the Act." *Id.*

1. Consideration of general principles of Florida's common law of littoral property.

Under Florida's pre-existing common law of property, a riparian or littoral owner has a right of ingress and egress to and from the lot to the water, a right of unobstructed view over the waters, and in common with the public the right of navigating, bathing, and fishing. *Thiesen v. Gulf, F. & A. Ry. Co.*, 78 So. 491, 501 (1917); *Webb v. Giddens*, 82 So.2d 743, 745 (Fla.

1955). Riparian and littoral land owners also have rights that are based on accretion or reliction. *Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Associates, Ltd.*, 512 So.2d 934, 936 (Fla. 1987). There are, however, no Florida common law littoral property rights to wharf out from land into the water. *Thiesen,* at 61, 78 So. at 501, or to have permanent contact with the water.

2. Consideration of the common law of the public's rights and property under the public trust doctrine and the customary use doctrine.

The people also have rights in the shore according to the public trust doctrine, which is specifically safeguarded in Article X, Section 11, of the Florida Constitution: "The title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people." Florida courts and other American courts have expansively interpreted the public trust doctrine to safeguard the public's use of navigable waters and the shoreline for purely recreational purposes such as boating, swimming, fishing, hunting, recreation, and to preserve scenic beauty. *See also Glass v. Goeckel*, 703 N.W.2d 58, 73, 78 (Mich. 2005) (holding that the public has the right to walk along the beach, for which no compensation is owed to littoral owners); *R.W. Docks & Slips v. Wisconsin Dept. of Natural*

Resources, 628 N.W.2d 781, 787-88 (Wis. 2001). This Court has also ruled that states have the authority to define the parameters of the public trust doctrine and to protect the public's rights in those lands as they see fit. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 484 (1988).

Florida common law also recognizes the rights of the public to access Florida's dry sand beaches under the customary use doctrine. *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So.2d 73, 78 (Fla. 1974) ("If the recreational use of the sandy area adjacent to mean high tide has been ancient, reasonable, without interruption and free from dispute, such use, as a matter of custom, should not be interfered with by the owner."). The customary use of the beach by the public is subject to reasonable regulation by the state. *Id.* According to Justinian's Institutes "by the law of nature the air, running water, the sea, and consequently the shores of the sea" were "common to mankind." JUSTINIAN, INSTITUTES II:I:1. The shore of the sea "extends as far as the greatest winter flood runs up." JUSTINIAN, INSTITUTES, II:I:3. Justinian observed that under Roman law "[t]he public use of the seashore . . . is part of the law of nations, as is that of the sea itself; and, therefore, any person is at liberty to place on it a cottage, to which he may retreat, or to dry his nets there, and haul them from the sea; for the shores may be said to be the property of no man, but are subject to the same law as the sea itself, and the sand or ground beneath it." JUSTINIAN, INSTITUTES, II:I:5.

Thus, Florida's common law of littoral property reflects recognition of rights and interests of both the upland property owners and the state, which holds littoral property in trust for the people. The people have important property rights in littoral areas, too, and these rights are just as important as the private property rights of upland owners. The State cannot abdicate its trust duties over public trust property it holds for the people, *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 452-453 (1892), any more than it can take private property without just compensation.[5] Without beach restoration, littoral property owners will lose their property and businesses, and possibly their lives, and the people, as well, will invariably lose rights guaranteed them under the public trust and customary use doctrines as the beach continues to erode.

3. Consideration of Florida's common law of reemergence and recapture by public work.

It is also a background principle of Florida's law of property that when the state reclaims riparian or

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[5] The Ninth Amendment, which was drafted, vetted by the states, and ratified contemporaneously with the Fifth Amendment, compels respect not only for the property rights of the individual, but also of the property rights of the people: "The enumeration in the Constitution, of certain rights, shall not be construed *to deny or disparage* others retained by the people." *Id.* (emphasis supplied).

littoral land, or causes land to reemerge by public work, the doctrines of reliction and accretion are not implicated, and the state holds title to such reclaimed or reemerged land. In 1927, the Florida Supreme Court held in *Martin v. Busch*, 93 Fla. 535, 112 So. 274 (1927), that under Florida's law of property, when the state lowered the water level of Lake Okeechobee and created dry land along the shore, the land so created belonged to the state rather than the upland riparian landowners, and the respective property line between the state and the upland owners remained where it had been prior to the lowering of the lake. The Court held that

> If to serve a public purpose the State, with the consent of the Federal authority, lowers the level of navigable waters so as to make the water recede and uncover lands below the original high water mark, the lands so uncovered below such high water mark, continue to belong to the State. . . . The doctrine of reliction. . . . , does not apply where land is reclaimed by governmental agencies as by drainage operations.

Id. at 574, 112 So. at 1287.

In so holding, the boundary line between the upland owner and the state was fixed at the line of ordinary high water, and in such cases, what was previously a variable property line at the water's edge was no longer so. Further, because the new water line was a distance from the prior high water line, the upland property owner's land holdings were no longer

influenced, affected, or increased by either accretion or reliction.

The common law contained in *Martin v. Busch* is codified in the Act, and, as background principles of the state's law of property, inheres in the title of any littoral landowner in Florida. Littoral property owners in Florida since at least 1927 have been apprised that their ancillary common law property rights are different if the state is reclaiming or restoring the shore. And, because the Act codifies Florida's common law as it is expressed in *Martin v. Busch*, the Petitioner in this case does not have the property rights it claims the Act, on its face, takes without compensation. Littoral property owners in Florida do not have a property right to accretion when the state restores the beach as the result of critical erosion. Nor do littoral property owners have a right to a fluid property line at the water's edge in such circumstances.

The rule of *Martin v. Busch* has been followed by the Florida courts in *Conoley v. Naetzker*, 137 So.2d 6 (Fla. Dist. Ct. App. 1962) ("If the disputed parcel was in fact reclaimed land resulting from drainage operations, then defendants as riparian owners on a navigable waterway could not have acquired title through reliction.") and *Padgett v. Central and Southern Florida Flood Control District*, 178 So.2d 900 (Fla. Dist. Ct. App. 1965) (holding that the doctrine of reliction does not apply to land reclaimed by drainage operations of governmental agencies). In 1981, the vitality of the rule in *Martin v. Busch* was affirmed,

and indeed extended, in *State Department of Natural Resources v. Contemporary Land Sales, Inc.*, 400 So.2d 488 (Fla. Dist. Ct. App. 1981), wherein the court held that the state would retain title to reclaimed bottomlands resulting from a project whose purpose was to lower the water level of a chain of lakes, and whose incidental effect was to expose new land.

Other state courts have similarly found no compensable taking where a government project associated with the shoreline affects littoral rights. In *Mississippi State Highway Comm'n v. Gilich*, 609 So.2d 367 (Miss. 1992), the Mississippi Supreme Court resolved ownership interests associated with construction of a man-made beach to support a highway project. *Id.* at 368-69. A property owner filed an inverse condemnation suit against the state claiming that the construction of the beach and highway resulted in a wrongful taking of their littoral rights. *Id.* The state took the position that the beach in question was land held in the public trust, and that the taking of riparian rights was noncompensable. *Id.* at 370. The Mississippi Supreme Court ruled against the property owner, finding that:

> Where the State has exercised its power to impose an additional public use on property already set aside for public purpose, the injury to riparian or littoral use on property already set aside for public purpose, the injury to riparian or littoral licenses is not a

> taking of private property for which compensation must be made.

Id. at 375.

Like the *Gilich* decision, the project in the instant case involves the construction of a man-made beach. In both cases, the littoral property owners claim that the government has taken littoral rights without compensation. The common law decisions amongst the various states apparently come to the same conclusion: there is no compensable taking associated with government projects and regulations associated with beach nourishment and restoration. In *Slavin v. Town of Oak Island*, 584 S.E.2d 100 (N.C. Ct. App. 2003), a North Carolina appellate court resolved a dispute between beachfront property owners and a town that had adopted a beach access plan and constructed a fence to protect a newly restored beach. *Id.* at 101. The littoral property owners claimed that the town had taken their riparian rights of access, because the owners could no longer directly walk down to the ocean, but now could only get to the ocean by traversing one of several designated public access points. *Id.* The North Carolina appellate court rejected the property owners' claims that they had a vested littoral right to direct access to the ocean, for which the government owed them compensation. *Id.* at 102. While the court agreed that the law recognizes the riparian right of access to the water, the property owners had misinterpreted that right. *Id.* The court held that a littoral property owner's right of access to the ocean is a qualified one, and is subject

to reasonable regulation by the state. *Id.* Thus, the court found that the property owners were not entitled to compensation from the state. *Id.*

Similar to *Slavin*, the Petitioner's access to the water is a qualified right, subject to reasonable regulation by the state. In *Slavin*, the town created an access plan and public access points which limited access along the newly restored beach, which meant that some property owners might have to walk some distance prior to accessing the beach. Here, after the beach restoration project is complete, Respondents will likewise still be able to access the water, if only after traveling the breadth of the new wider sandy beach to reach the water.

4. Consideration of whether there is a common law littoral property right in Florida to a seaward property boundary at the water's edge, or whether the littoral property right is only a right to access to the water.

The Florida Supreme Court's ruling in this case that, under Florida common law, there is no independent littoral property right of contact with the water, as contact is merely ancillary to the littoral right of access, *Walton County*, at 119, is a principled decision that is not simply designed to take property without just compensation. It rests solidly "upon *a fair or substantial basis.*" The Florida Constitution and Florida common law both place the dividing line

between private property and state property at the mean high water line. *Brickell v. Trammell,* 82 So. 221, 228 (Fla. 1919); *Sullivan v. Richardson*, 14 So. 692 (Fla. 1894).

Under Florida common law, when erosion submerges littoral land that was previously dry, title does not necessarily revert to the state. Similarly, if it subsequently reappears as a result of accretion, it does not necessarily attach to the littoral upland property. In both cases, the relevant line is the mean high tide line, which is based upon a nineteen-year tidal cycle. *Kruse v. Grokap, Inc.*, 349 So.2d 788 (Fla. Dist. Ct. App. 1977) (rejecting a claim to title to littoral land that had eroded and been submerged for several years, and had thereafter reappeared by accretion, because plaintiff failed to present evidence based on the mean high water line). By establishing the common law property line as the mean high tide line rather than the day's high tide line, the common law in Florida affords littoral property owners more protection against losing their property to the sea.

At the same time, however, Florida's use of the mean high water line eliminates any notion that contact with the water is a property right associated with littoral upland property. Simply put, contact with the water is only possible if the line of demarcation between private property and public property is the water line. Use of the water line results in common contact with the water. Use of the high tide line, on the other hand, results in common contact with the water line for two short periods each day.

But use of the mean high water line as the common law property line results in common contact with the water for only very short periods of time, sometimes months apart. And as most of Florida's shores slope gently, the high tide line and the low tide line are ordinarily a significant distance apart.

Based on *Kruse*, there is nothing in the Florida Supreme Court's opinion in the present case that even remotely implies that the Court made an *ipse dixit* decision in this case with the transparent design to find no taking of private property. The Florida Supreme Court was clearly on solid doctrinal ground when it observed that any purported common law claim of a littoral property right to contact with the water is a claim without substance. The common law having, on balance, afforded the upland littoral property owner the benefit of the mean high water line, it follows that as a matter of logic as well as experience, there can be no absolute littoral property right of contact with the water where, by virtue of the mean high water line, contact with the water is not an inherent attribute of the upland owner's property or title. At best, contact with the water only happens on an extremely transitory basis, and for very limited periods of time. At all other times when the tide is below the mean high water line, a littoral property does not make contact with the water, and a littoral property owner must, invariably, cross another's land to enter the water.

5. Consideration of Florida's common law littoral right to access.

The Florida common law recognizes a littoral property right to access, which specifically is the right to access "over the foreshore" to the water. *Hayes v. Bowman*, 91 So.2d 795, 801 (Fla. 1957). If contact with the water was a right of its own, then both the right of *access*, and access "*over the foreshore*" would be unnecessary and redundant. The Florida Supreme Court was justified in observing this distinction in the common law that the property right is access, not uninterrupted contact with the water. The Act provides that the Board of Trustees of the Internal Improvement Trust Fund (which consists of the Governor and the members of the Cabinet) must establish the mean high water line for the area to be restored prior to the project. The restored area is only subject to the same easement rights in the public that existed prior to the project. *Fla. Stat.* § 161.141. The Act further provides that once the line is established, the restoration will not be effected seaward of the line "unless the state first obtains the written consent of all riparian upland owners whose view or access to the water's edge would be altered or impaired." *Id.*

This assessment by the Florida Supreme Court is compatible with the common law in other states. Indeed, these *amici* cannot find that any state's common law of property contains a rule that a littoral property owner has a property right to absolute or uninterrupted contact with the water.

6. Consideration of the Florida common law of accretion in the context of the case.

Littoral land owners also have rights that are based on accretion or reliction. *Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Associates, Ltd., supra,* at 936. But in the present case (as in all cases of beach restoration under the Act), given that the beach area has been scientifically determined to be critically eroded and not capable of being naturally restored by accretion or reliction, the likelihood of accretion is extremely remote, let alone accretion all the way to the pre-avulsive shoreline boundary. If it is evident that the beach will naturally restore itself, then there will be no need to restore the beach by public work. The Court in the present case therefore reasonably explained that the contingent future interest right to accretion is either non-existent or so remote as not to be relevant to a beach that is critically eroded. Nor is the matter of accretion relevant to the legal balancing of rights and interests necessary to decide whether the property provisions of the Act are a fair and just statement of the law and the legal rights and interests of the state and the littoral property owner when the state restores a severely eroded beach.

7. Consideration of the influence of the Florida common law of avulsion and its relevance to the judicial analysis.

There is also fair and substantial reason for the Florida Supreme Court to have considered the common law of avulsion in this case, as it indicates that the common law of littoral property is not subject to universal and inflexible rules. On the contrary, the common law has developed different rules to balance the interests and policies in different situations. By the common law, while the traditional rules of accretion and reliction operate to concomitantly increase or diminish the littoral property owner's lands, avulsion is treated differently, and losses or gains of dry land that are proved to be due to avulsive events do not affect the extent of title. *Bryant v. Peppe*, 238 So.2d 836 (Fla. 1970). Furthermore, whether it is the state or a private owner, upon proof of avulsion an owner of property generally has the right to restore the property within a reasonable time. *See generally* 1 Henry Philip Farnham, *The Law of Waters and Water Rights* § 74, at 331 (1904). As shown by this different (avulsion) common law regime, different rules have developed to reflect different circumstances, and the fact that the common law of littoral property is different under certain circumstances was certainly relevant to the Florida Supreme Court's judicial analysis.

In *Bryant v. Peppe*, *supra*, the Florida Supreme Court followed the doctrine of avulsion to hold that

dry land created by a hurricane where a pass had previously been belonged to the state, rather than to the adjacent private littoral properties. Further, the common law right of the state to reclaim submerged land by an avulsive public work was established in Florida in *Martin v. Busch, supra,* at least eighty years before the Florida Supreme Court applied this rule in the instant case. Moreover, the Florida law rule is consistent with the common law in other states. *See e.g., Barakis v. American Cyanamid Co.,* 161 F. Supp. 25 (N.D. Tex. 1958) (under Texas common law, land built up artificially by a Water District project is considered avulsion and does not change the boundaries between public and private land); *Garrett v. State*, 289 A.2d 542 (N.J. Super. Ch. 1972) (the state may construct a public work or allow a work that causes a navigable stream to dry up without losing title to the bed of the stream); *see also State by Kobayashi v. Zimring*, 566 P.2d 725 (Haw. 1977) (shoreland created by lava flows does not belong to the littoral property, but vests in the state). Specifically, the common law of other states recognizes that the state has the right to reclaim land after an avulsive event. *See City of Chicago v. Ward*, 48 N.E. 927 (Ill. 1897); *Fowler v. Wood*, 85 P. 763 (Kan. 1906).

Florida's common law of avulsion is reflected in the Act. The Act provides that the Erosion Control Line is the mean high water line, and further provides that an affected littoral landowner can challenge the line if he or she believes the mean high

water line is incorrect. The Act specifically states that the line so established shall not extend the state's claims to any lands not already held by the state. *Fla. Stat.* § 161.141.

The terms of the Act are a fair expression of what the common law is, and whatever property may be affected by the statute is adequately compensated for by the beach restoration and the state's future commitment to manage and maintain the restored beach that comes with the restoration. Thus, the Act follows the common law of littoral property, which is based on a balancing of interests and policy, and admittedly, to some extent (in favor of the private property owner and against the public), on "convenience." The Florida Supreme Court explained that:

> These common law doctrines reflect an attempt to balance the interests of the parties affected by inevitable changes in the shoreline. For instance, . . . *[t]here are four reasons for the doctrine of accretion:* (1) *[D]e minimis non curat lex*; (2) he who sustains the burden of losses and of repairs imposed by the contiguity of waters ought to receive whatever benefits they may bring by accretion; (3) it is in the interest of the community that all land have an owner and, for convenience, the riparian is the chosen one; (4) the necessity for preserving the riparian right of access to the water.

Walton County, at 1114.

In sum, the balancing engaged in by the Florida Supreme Court is typical of the analytical methodology for the common law in general. Oliver W. Holmes explained that methodology in *The Common Law*:

> [T]he life of the [common] law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.

Oliver W. Holmes, Jr., *The Common Law*, 1 (Boston, Little, Brown, and Company) (1881). The common law is dynamic. It is not a Decalogue from

on high, admitting of no variation. It has never been frozen in time. "[T]he common law is not immutable but flexible, and by its own principles adapts itself to varying conditions." *Funk v. United States,* 290 U.S. 371, 383 (1933). Furthermore, "an adoption of the common law [by a state] in general terms does not require, without regard to local circumstances, an unqualified application of all its rules. . . ." *Id.* at 384.

C. The Act does not take property under the Fifth Amendment because the claimed property rights in this case are not part of the background law of property that inheres in the owner's title according to the state law of property.

This Court has explained that a landowner is not entitled to compensation under the Fifth Amendment for uses that are restricted by background principles of property and nuisance law, nor for property interests or rights that do not inhere in the landowner's title under the state's law of property. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1026-32 (1992); *see also Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 125 (1978); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913) (shore owner has no appurtenant property right to two natural levels of water in front of its lands).

IV. ON ITS FACE, THE ACT PROVIDES MORE THAN ADEQUATE COMPENSATION FOR ANY PRIVATE PROPERTY INTERESTS AFFECTED BY BEACH RESTORATION. THE RESTORED BEACH AND COMMITMENT TO MAINTAIN THE RESTORED BEACH ARE MORE THAN JUST COMPENSATION FOR ANY THEORETICAL LOSS OF FUTURE ACCRETION.

Even if the alleged interests were actually affected by the provisions of the Act, and had to be factored in the legal equation, where critically eroded beaches are restored by the government, the amount spent by government directly for the benefit of the upland owner and the immediate and lasting benefits that directly accrue to the upland owner are more than just compensation for beach restoration's effects on such interests. The Act is not unconstitutional, even if it does take property, because the value of the beach restoration that accompanies the Act's impacts is inherent in the Act and more than adequate to compensate for any such impacts. The Fifth Amendment speaks to takings *without just compensation*. The value of a contingent, yet remote, future interest in accretion on a shore that the visible and empirical evidence shows is not likely to ever occur is clearly offset by the value of the restoration. A reconstructed beach and a commitment by the government to maintain that beach against erosion from future hurricanes and catastrophic storms is "just compensation"

if purported property rights in accretion, reliction and contact with the water are affected or extinguished.

The average cost of a mile of reconstructed beach in Florida is between $3,000,000 and $5,000,000, simply for the initial restoration. The government continues to spend money over the period of the project to maintain and renourish the beach. A littoral property owner who, prior to the restoration, was presented with the clear and present danger of losing his or her property and any structures thereon to the sea, which structures may provide entire shelter of a business location, and possibly even his or her life, is no longer at risk. The owner's property value increases, and the cost to insure the property decreases.

CONCLUSION

This case does not evince a disregard for property rights, and beach restoration is too important to Florida citizens and to this country to lose over extreme views of property rights. The decision of the Florida Supreme Court should not be disturbed.

Boca Raton, Florida, October 5, 2009

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-1151

IN THE

Supreme Court of the United States

STOP THE BEACH RENOURISHMENT, INC.,
Petitioner,

v.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND, WALTON COUNTY, AND CITY OF DESTIN,
Respondents.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

Amici will address the following questions:

1. Whether the Florida Supreme Court's resolution of questions of Florida property law in this case has full or fair support in prior Florida law.

2. Whether, as petitioner asserts, the judgment of the Florida Supreme Court gives rise to a cause of action for just compensation under the Takings Clause.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include county and city governments and officials throughout the United States.[1] *Amici* have a compelling interest in preserving their police power to engage in reasonable land use regulation in furtherance of environmental preservation, such as beach renourishment in littoral States whose economies and quality of life depend upon taking essential measures to counter beach erosion.

This Court has historically been reluctant to interfere with state and local governments' exercise of their police powers, even when alleged to effect a deprivation of property, and has accorded police power regulations "a considerable latitude of discretion." *Reinman v. City of Little Rock*, 237 U.S. 171, 177 (1915). As explained by the court below, "[r]ecognizing the importance and volatility of Florida's beaches, the [Florida] Legislature . . . enacted the Beach and Shore Preservation Act." Pet. App. 8. As this case demonstrates, the "judicial takings" theory advanced by petitioner would pose a serious obstacle to the accomplishment of the vital environmental preservation that has been the goal of this statute for almost half a century.

Amici respectfully submit that a judicial takings doctrine is both unnecessary for the protection of constitutional rights and unworkable as a legal re-

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[1] The parties have consented to the filing of this *amicus* brief and their consent letters have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* and their members, has made a monetary contribution to the preparation or submission of this brief.

medy. They accordingly submit this brief to assist the Court in the resolution of this case.

SUMMARY OF ARGUMENT

1. There is no need for this Court to recognize petitioner's proposed "judicial takings" doctrine because there is nothing novel about its federal constitutional challenge to the judgment below. For over a century the Court has conducted limited and highly-deferential review of state-court interpretations of state law challenged as violating federal rights. As this Court reiterated six decades ago, state-law questions are "conclusively settled by the decision of the state court save only as this Court, in the performance of its duty to safeguard an asserted constitutional right, may inquire whether the decision of the state question rests upon a fair or substantial basis." *Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649, 654 (1942).

The judgment of the Supreme Court of Florida easily satisfies scrutiny under the traditional "fair or substantial" standard. The court below had more than fair or substantial support in state law for its judgment because it did not change Florida law in any significant respect. Its judgment is based on detailed analysis of, and pertinent quotations from, Florida common and statutory law. There is nothing to suggest that the court reached its decision in bad faith; on the contrary, the existence of substantial majority and dissenting opinions indicates a full and fair canvassing of state law. Notwithstanding petitioner's invocation of a "judicial taking" doctrine, the judgment below should be affirmed because of its fair and substantial basis in Florida law.

2. Petitioner's "judicial takings" theory is legally unsound and violates core principles of constitutional federalism. The Takings Clause was enacted against a legal backdrop that included a long history of legislative and judicial modification of state-law property interests. Examples of such reasoned and reasonable modifications abound since the adoption of the Bill of Rights.

Such development of property law has always been based on a strong interrelationship between state legislatures and state courts, an essential foundation of our legal system. The strong interrelationship between the legislative and judicial branches of state government which has always been essential for the development of American law would be seriously threatened by the adoption of a novel doctrine of "judicial takings."

Finally, petitioner's judicial takings theory is unworkable. It would encourage inefficient litigation and make this Court the final arbiter of diverse state property-law doctrines, all in aid of a novel legal remedy that is unnecessary to protect constitutional rights.

ARGUMENT

I. THE JUDGMENT OF THE SUPREME COURT OF FLORIDA SHOULD BE AFFIRMED BECAUSE IT IS SUPPORTED BY A FAIR AND SUBSTANTIAL BASIS IN FLORIDA LAW.

There is nothing novel about petitioner's federal constitutional challenge to the state-law judgment of the Supreme Court of Florida, nor does it require this Court to fashion a new and uncharted doctrine of "judicial takings." For over a century the Court

has conducted limited and highly-deferential review of state-court interpretations of state law that are challenged as violating federal rights. As the Court explained in *Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649, 654 (1942), state-law questions are "conclusively settled by the decision of the state court save only as this Court, in the performance of its duty to safeguard an asserted constitutional right, may inquire whether the decision of the state question rests upon a fair or substantial basis." *Id.* at 654 (citing *Broad River Power Co. v. South Carolina*, 281 U.S. 537 (1930)). *E.g., Demorest v. City Bank Farmers Trust Co.* 321 U.S. 36, 42 (1944).[2]

In *Demorest* this Court rejected petitioner's claim that a judgment of the New York Court of Appeals

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[2] *Accord Howlett v. Rose*, 496 U.S. 356, 366 (1990) (municipalities' state-law immunity subject to review if state-law basis for immunity was "without any fair or substantial support"); *New York Times v. Sullivan*, 376 U.S. 254, 265 n.4 (1964) (state-court ruling not reviewed by this Court because it did not lack 'fair or substantial support' in prior Alabama decisions"); *Wolfe v. North Carolina*, 364 U.S. 177, 185-86 (1960) ("It is settled that a state court may not avoid deciding federal questions and thus defeat the jurisdiction of this Court by putting forward nonfederal grounds of decision which are without any fair or substantial support."); *Staub v. City of Baxley*, 355 U.S. 313, 318-19 (1958) (state-court ruling implicating right to freedom of speech inadequate because it was "without any fair or substantial support" in state law); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 455 (1958) (state court judgment on state-law grounds reviewed because it was "without any fair or substantial support"); *Lawrence v. State Tax Comm'n*, 286 U.S. 276, 282-83 (1932) (state-law grounds for refusal by state court to consider constitutionality of a tax were not "fair or substantial" but rather were "unsubstantial and illusory"); *Ward v. Love County Bd. of Comm'rs*, 253 U.S. 17, 22 (1920) (state-court ruling evaded federal law "by putting forward non-federal grounds of decision that were without any fair or substantial support").

effected a federal taking by overruling prior decisions and modifying certain rights of income and remainder beneficiaries in trust property. If, the Court explained, "there is no evasion of the constitutional issue . . . and the nonfederal ground has fair support, this Court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule for that of the state court." *Id.* at 42 (quoting *Broad River Power Co.*, 281 U.S. at 540).

While this rule ensures that a state court judgment cannot evade a federal claim or insulate an unconstitutional statute from federal review merely "by putting forward non-federal grounds of decision," *see Ward v. Love County Bd. of Comm'rs*, 253 U.S. 17, 22 (1920), where there is "no pretence that the [state] Court adopted its view in order to evade a constitutional issue" this Court must accept the state court's determination of its law as authoritative. *Nickel v. Cole*, 256 U.S. 222, 225 (1921). By contrast, a state ground of decision is inadequate "where [it] is so certainly unfounded that it properly may be regarded as essentially arbitrary or a mere device to prevent a review of the decision upon the federal question." *Enterprise Irrigation Dist. v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164-65 (1917).

The applicable line of cases demonstrates that this Court's sole interest when reviewing state-court judgments interpreting state law is ensuring that state courts do not willfully evade the Constitution's requirements. The Court thereby ensures that federal rights will not be violated by state courts acting in bad faith. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Bouie v. City of Columbia*, 378 U.S. 347, 455 (1964); *Ward*, 253 U.S. at 22.

When the judgment below is examined to determine whether it rests on a fair or substantial basis in Florida law, it is clear that it should be affirmed. As respondents Walton County and the City of Destin demonstrate, the Supreme Court of Florida "had more than fair support" in state law because "it did not change Florida law in any significant respect at all." Resp. Br. 32; *see id.* at 32-41. The state court's construction of the Beach and Shore Preservation Act is replete with detailed analysis of, and quotations from, Florida common and statutory law. There is nothing in the opinion to suggest any bad faith on the part of the court; on the contrary, the existence of substantial majority and dissenting opinions indicate a full and fair canvassing of the law by the Florida justices. There is accordingly no basis to conclude that their judgment lacked a fair or substantial basis in state law.

By contrast, petitioner's proposed "judicial takings" doctrine squarely conflicts with the long tradition of limited, highly deferential review of state court judgments by this Court. It thus fails to provide a federal-law basis for reversing the judgment of the Supreme Court of Florida.

II. PETITIONER'S JUDICIAL TAKINGS THEORY IS LEGALLY UNSOUND AND VIOLATES CORE PRECEPTS OF FEDERALISM.

From the time of the adoption of the Takings Clause, regulation of property rights was accepted as compatible with the Amendment's mandate. Petitioner and its *amici* emphasize that property rights were important to the Founders. They ignore, however, the centuries-long tradition of respect for state power to define and regulate property interests

through statutory and common law. Petitioner's theory of "judicial takings" and its *amici*'s skewed account of takings jurisprudence fail to incorporate this constitutional history and run roughshod over core principles of federalism.

A. The History of the Takings Clause Shows Respect for State Control of the Development of Property Law.

The Fifth and Fourteenth Amendments were adopted against a legal backdrop that included significant legislative and judicial modifications of long-established common-law property interests.

This history is left out of the expansive interpretation of the Takings Clause advanced by petitioner and its *amici*. From our very beginnings, property regulation went hand-in-hand with American ideals; "American legislatures extensively regulated land use between the time America won its independence and the adoption of the property-protecting measures of the Constitution and the Bill of Rights." John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 Nw. U. L. Rev. 1099, 1100 (2000).

At the time of the Founding, most States were engaged in reform of traditional inheritance laws. *See* Stanley N. Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 Mich. L. Rev. 1 (1977). Thomas Jefferson was the prime mover behind Virginia's statutory revision of inheritance laws, which was "[t]he brightest example of the reform process." *Id.* at 12.

Prior to Jefferson's reform efforts, Virginia's inheritance law "largely adhered to the English system." *Id.* By 1785, with Jefferson's help, Virginia

had changed the law to abolish both entail and primogeniture. *Id.* at 13. James Madison, the Framer most responsible for the Takings Clause, supported these efforts despite the fact that "Virginia's abolition of entail destroyed valuable reversionary interests in land and slaves that Virginia courts had long protected." Hart, *Land Use Law in the Early Republic*, *supra*, at 1130. Certainly the abolition of entail modified a significant property interest, but Madison did not suggest that termination of this property interest was improper or required compensation.

The other States followed suit, and by 1800 virtually all of them had changed their property laws to abolish primogeniture and entail. To the extent this property-rights limitation was challenged, the Supreme Court upheld it. *See Van Rensselaer v. Kearney*, 52 U.S. 297 (1850) (upholding New York court's validation application of the N.Y. statute of which abolished entail).

The adoption of the Fourteenth Amendment, and the application of the Takings Clause to the States, did not change this legal landscape. In the era of Reconstruction, reform movements sought to change archaic common-law concepts that had grown incompatible with changing conditions and ideals. One example of such reform is the statutory modification of marital property interests and abrogation of the common law of coverture.[3]

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[3] The centuries-old common law of coverture had given husbands rights in their wives' property and earnings. *See* Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 Geo. L.J. 2127 (1994). During the nineteenth century, however, States passed legislation modifying or repealing the law of coverture to give wives the capacity to enter into legal transactions and grant them

The law of coverture was reformed in two phases. First, "reform began with the passage of married women's property acts that allowed wives to hold property in their own right." Siegel, *The Modernization of Marital Status Law*, *supra*, at 2141. Second, the reform movement advocated for earnings statutes, which would have "allowed wives to assert property rights in their labor and granted wives various forms of legal agency respecting their separate property, including the capacity to contract and file suit." *Id.*

After these reform statutes were enacted, "[i]t fell to the courts in the late-nineteenth century to decide how to square the reform statutes with a common law tradition." *Id.* at 2148. Prior to coverture reforms, the common law property "bundle of sticks was rather large for men and correspondingly small for married women." Jerry L. Anderson, *Comparative Perspectives on Property Rights: The Right to Exclude*, 56 J. Legal Educ. 539, 540 (2006). After the reform of coverture, certain elements henceforth belonged to women. Yet despite this alteration of property rights, neither the reform acts themselves nor the judicial decisions squaring the statutes with the common law were declared unconstitutional takings.

Accordingly, at the time the Takings Clause was ratified, as well as when it was applied to the States in the mid-nineteenth century, States were extensively engaged in modification of common law property interests in response to changed conditions.

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rights in their property and earnings. *See, e.g.*, Kathleen S. Sullivan, Constitutional Context: Women and Rights Discourse in Nineteenth Century America 69-70 (2007); Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 Geo. L.J. 1359, 1397-98 (1983).

B. Development of State Property Law Requires a Strong Relationship Between State Legislatures and State Courts That Should Not Be Sundered by Petitioner's Doctrine of Judicial Takings.

The examples of property law development discussed above are illustrative not just of the constitutionality of state reform of the common law, but also of the interaction between background common law interests and legislative enactments. Petitioner's proposed federal "judicial takings" review threatens to disturb this time-honored, incremental development of state common law of property by state and local policy makers and state courts.

From the beginnings of our legal system, the United States has "been a nation of both statutes and common law." Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 Iowa L. Rev. 545, 548 (2007). Following Oliver Wendell Holmes, legal theorists observed that state legislatures, enacting statutes, and common law courts, by interpreting these statutes and filling in any gaps related to background common law principles, worked in tandem and "argued for a strong interrelationship between the common law and legislative developments." *Id.* at 551.

As Dean Pound noted, even in an era of increased legislative and executive lawmaking, common law remained necessary "to fill the gaps in legislation, to develop the principles introduced by legislation, and to interpret them." Roscoe Pound, The Spirit of the Common Law 174 (1921). *See also Moragne v. States Marine Lines*, 398 U.S. 375, 392 (1970) ("It has always been the duty of the common-

law court to perceive the impact of major legislative innovations and interweave the new legislative policies with the inherited body of common-law principles—many of them derived from earlier legislative exertions.").[4]

The interaction between the common law and statutory law has been longstanding. One of Blackstone's purposes was to "show legislators the problems with the state of the common law so that they might be inclined to exercise their statutory authority in amending it." Bernadette Meyler, *Towards a Common Law Originalism*, 59 Stan. L. Rev. 551, 562 (2006).[5]

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[4] If common-law courts fill in a legislative gap in a way at odds with the will of the people or the intent of the state legislature, the latter can clarify the law to reverse or soften judicial common law decisions. *See* M. Stuart Madden, *The Vital Common Law: Its Role in a Statutory Age*, 18 U. Ark. Little Rock L.J. 555, 562 (1996) ("Where a state's high court has countenanced a new rule, the political process provides for a legislative veto."); Ellen Ash Peters, *Common Law Judging in a Statutory World: An Address*, 43 U. Pitt. L. Rev. 995, 997 (1982) ("Even in cases to which no statute presently applies, the fact that the legislature is always, or virtually always, in session casts a considerable shadow on innovation in common law growth and development.").

[5] The first States recognized the diversity of state common law, and the potential for further diversity due to state court interpretations of the common law or legislative modifications. *See* Hugh Henry Brackenridge, Law Miscellanies iv (Lawbook Exchange Ltd. 2001) (1814) (compilation designed to create "an edition of Blackstone's Commentaries . . . referring to the variations in the law as it is in the state of Pennsylvania from that of England: the variations in the introduction of the common law, and in the statute law as it has been changed, or superseded, by our acts of assembly").

Connecticut Supreme Court Justice Ellen Ash Peters has noted that "the role of statutes is just as crucial in the litigation involving so-called common law subjects, such as torts, contracts, property, and procedure, as elsewhere." Peters, *Common Law Judging in a Statutory World*, *supra*, at 995. Statutes themselves are often "a source of policy for consistent common law development." *Id.* at 998. Just as legislatures consider the common law in enacting statutes, state courts consider statutes "as a source of common law policy." *Id.* at 1006.

Interrupting this dynamic relationship through federal "judicial takings" review would undermine the nation's system of "cooperative judicial federalism," *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974), in which state courts have the authority to define and develop state common law rules of property. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1032 n.18 (1992). Federal court review of state common-law judgments under the guise of "judicial takings" claims would have a disruptive effect on cooperative judicial federalism.

The Florida legislature acted precisely to keep pace with its changing environment in enacting the Beach and Shore Preservation Act of 1965. Fla. Stat. §§ 161.011 *et seq*. Acting to protect the State's citizens and environment, the legislature declared that "beach erosion is a serious menace to the economy and general welfare of this state and has advanced to emergency proportions." Fla. Stat. § 161.088. The Act modifies or suspends certain aspects of common law to respond to changing environmental and economic conditions, while expressly preserving all other common law rights. *Id.* § 161.201.

This statute and the Florida Supreme Court's construction of it in accordance with the common law principles exemplify the dynamic relationship in which state courts and state legislatures engage to develop state law. This Court is ordinarily highly deferential to this process. *See, e.g., General Motors Corp. v. Romein*, 503 U.S. 181, 187 (1992). As the Court explained in *Sauer v. City of New York*, States have the right to modify and determine complex issues at the intersection of private and public property, even if it is sometimes a messy process:

> The right of an owner of land abutting on public highways has been a fruitful source of litigation in the courts of all the states, and the decisions have been conflicting, and often in the same state irreconcilable in principle. The courts have modified or overruled their own decisions, and each state has in the end fixed and limited, by legislation or judicial decision, the rights of abutting owners in accordance with its own view of the law and public policy. As has already been pointed out, this Court has neither the right nor the duty to reconcile these conflicting decisions nor to reduce the law of the various states to a uniform rule which it shall announce and impose.

206 U.S. 536, 548 (1907).

Amici urge the Court to ensure that state legislatures and common law courts are allowed the "substantial leeway" required to reevaluate and refine common law interests in response to changing conditions. *See Rogers v. Tennessee*, 532 U.S. 451, 462 (2001).

C. Petitioner's Judicial Takings Theory Is Unworkable.

Petitioner's theory of federal judicial takings review would encourage inefficient litigation, make this Court the final arbiter of diverse state property law regimes, and, as explained in Argument I, *supra*, introduce a novel constitutional theory that is wholly unnecessary to protect constitutional rights.

Any claims raised under a judicial takings theory could likely only be brought on direct review to this Court. Federal review of state court judgments is based on the Supremacy Clause of Article VI, as enforced by the First Judiciary Act, 1 Stat. 73, 85 (1789), codified at 28 U.S.C. § 1257. Section 1257 confers exclusive jurisdiction to review the final judgments of state courts upon this Court. *Id.*

The *Rooker-Feldman* doctrine has made clear that a federal district court may not exercise subject matter jurisdiction over a lawsuit complaining of an injury caused by a state court judgment and seeking review and rejection of the judgment. *See, e.g.*, *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 291 (2005); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). *See also Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323 (2005). Accordingly, challenges to state court decisions as violative of the Takings Clause can be brought only in this Court. *See* Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449, 1511 (1990) ("Because of the limited authority of federal district courts to review state court decisions collaterally . . . only the United States Supreme Court may be able to hear most judicial takings challenges to state decisions.").

With the Supreme Court as the only federal forum, petitioner's judicial takings theory raises logistical difficulties, particularly where, as here, there is no evidentiary record on key elements of a takings claim. *Cf. Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994) (Scalia, J., dissenting from denial of certiorari) (noting that the lack of "any record concerning the facts" was an obstacle to reviewing petitioners' judicial takings claim).

In this case, there has been no record compiled on the property owner, the parcel of property, the value of the property, or any offsetting benefits. There has been no demand for just compensation and the State has not denied such compensation. *See San Remo*, 545 U.S. at 326 ("[T]akings claims are not ripe until a State fails 'to provide adequate compensation for the taking.'") (quoting *Williamson County*, 473 U.S. at 195). As Justice Scalia noted when the Court was faced with a similar evidentiary lacuna, "[i]t is beyond our power—unless we take the extraordinary step of appointing a master to conduct factual inquiries—to evaluate petitioners' takings claim." *Cannon Beach*, 510 U.S. at 1207.

Petitioner's judicial takings theory would require this Court to monitor and review diverse systems of state property law. This theory would also compel the Court to oversee the development, *ab inititio*, of evidentiary records adequate to adjudicate each judicial takings claim. In short, petitioner's theory is unworkable as a practical matter as well as unsound as a legal matter.

CONCLUSION

The judgment of the Supreme Court of Florida should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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08-1151

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In The
Supreme Court of the United States

STOP THE BEACH RENOURISHMENT, INC.,
Petitioner,

v.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, *et al.*,
Respondents.

On Writ of Certiorari to the Florida Supreme Court

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS AND FLORIDA HOME BUILDERS ASSOCIATION SUPPORTING PETITIONERS

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BOTH 4 WAFIC

QUESTIONS PRESENTED

The Florida Supreme Court invoked "nonexistent rules of state substantive law" to reverse 100 years of uniform holdings that littoral rights are constitutionally protected. In doing so, did the Florida Court's decision cause a "judicial taking" proscribed by the Fifth and Fourteenth Amendments to the United States Constitution?

Is the Florida Supreme Court's approval of a legislative scheme that eliminates constitutional littoral rights and replaces them with statutory rights a violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution?

Is the Florida Supreme Court's approval of a legislative scheme that allows an executive agency to unilaterally modify a private landowner's property boundary without a judicial hearing or the payment of just compensation a violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution?

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INTEREST OF THE AMICI

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this amici curiae brief supporting petitioners.[1] NAHB is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the shelter industry. As the voice of America's housing industry, NAHB helps promote policies that will keep housing a national priority. Founded in 1942, NAHB is a federation of more than 800 state and local associations, of which the Florida Home Builders Association is one. About one-third of NAHB's 200,000 members are home builders and/or remodelers, and its members construct about 80 percent of the new homes built each year in the United States.

NAHB is a vigilant advocate in the Nation's courts, and it frequently participates as a party litigant and amicus curiae to safeguard the property rights and interests of its members. NAHB was a petitioner in *NAHB v. Defenders of Wildlife*, 551 U.S. 644 (2007). Attached at Appendix A to this brief is a list of cases in which NAHB has participated before this Court as amicus curiae or "of counsel." A large number of those cases involved landowners and other

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[1] Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

parties aggrieved by over-zealous regulation under a wide array of statutes and regulatory programs.

The organizational policies of NAHB have long advocated that a property owner must be compensated when government acquires their land or reduces its value by regulation. NAHB's members frequently face state action that eliminates the economically viable use of their property, and it supports the application of the Fifth Amendment's Takings Clause to legislative, executive, and judicial action.

SUMMARY OF ARGUMENT

This matter provides an opportunity for the Court to clarify that the Takings Clause of the Fifth Amendment applies to judicial action in the same manner as it applies to actions taken by other branches of government. *Chicago, B. & Q. R. Co. v. Chicago,* 166 U.S. 226 (1897), applied the Takings Clause to state action, and strongly suggested that state courts were subject to its requirements. Since this decision, there has been debate as to whether a judicial taking can occur, yet this Court has not directly addressed the operation of the Takings Clause to decisions by state courts.

This Court has recognized that state courts are not immune from other Constitutional protections, and it should now unequivocally state that judicial takings are no different than legislative or executive takings.

ARGUMENT

I. THE FOURTEENTH AMENDMENT REQUIRES APPLICATION OF THE TAKINGS CLAUSE TO STATE JUDICIAL ACTIONS.

A scholarly debate has long existed concerning the existence of "judicial takings."[2] NAHB suggests that an application of this Court's longstanding precedent dictates that judicial takings can and must occur, thereby triggering the payment of compensation to aggrieved property owners.

The Court has consistently found that judicial action is encompassed by the Fourteenth Amendment's applicability to state action. *Infra* pp. 3-6. Furthermore, the Court has long held that the Fifth Amendment's Takings Clause applies to the states, through the Fourteenth Amendment. *Infra* pp. 7-8. NAHB respectfully submits that because the Takings Clause applies to state action through the Fourteenth Amendment—and judicial action is encompassed by state action—then the Takings Clause must apply to judicial actions and decisions.

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[2] *Compare* Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449 (1990) (arguing that there is no justification for exempting courts from property protections that are applied to other branches of government) *with* Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 Utah L. Rev. 379 (2001) (the Takings Clause is limited to legislative and executive action).

A. State Courts Have Been Found to Violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

This Court has unequivocally determined that state judicial action is state action to which federal Constitutional protections apply. The foundation of this principle has been based on this Court's recognition that the Fourteenth Amendment applies to judicial decisions in the same manner as it applies to legislative and executive actions.[3]

In *Shelley v. Kraemer*, 334 U.S. 1 (1948), the Court forcefully reiterated this stance, holding that the Fourteenth Amendment encompassed all state action of whatever sort, including those taken by the judiciary. The Court explained:

> [F]rom the time of the adoption of the Fourteenth Amendment . . . it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference, includes action of state courts and state judicial officials . . . it has never been suggested that state court action is immunized from the operation of those provisions simply

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[3] *Broad River Power Co. et al. v. South Carolina*, 281 U.S. 537, 540 (1930) ("Even though the constitutional protection invoked be denied on nonfederal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus evaded.")

> because the act is that of the judicial branch of the state government.

Id. at 18. The Court in *Shelley* determined that the state court violated the Equal Protection and Due Process clauses of the Fourteenth Amendment by upholding racially motivated restrictive covenants. *Id.* at 20. It is important to note, however, that the Court did not limit the application of the Fourteenth Amendment to Due Process and Equal Protection—stating broadly the Amendment applied generally to state judicial action.

Since *Shelley*, this Court, the lower federal courts, and state courts have all regularly determined that judicial decisions can violate Due Process and Equal Protection guarantees under the Fourteenth Amendment.[4]

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[4] *E.g.*, *Brinkerhoff-Faris Trust & Savs. Co. v. Hill*, 281 U.S. 673, 680 (1930) ("The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government."); *Vill. of Willowbrook v. Olech*, 528 U.S. 562 (2000) (Equal Protection clause applied to all government activity, whether legislative, executive, or judicial); *Moose Lodge 107 v. Irvis*, 407 U.S. 163 (1972) (state action may stem from administrative, legislative, or judicial action for purposes of equal protection violation); *Rogers v. Tennessee*, 532 U.S. 451, 456 (2001) (judicial reformation of the law in the context of criminal statutes violates due process); *Jones v. Evans*, 932 F. Supp. 204, 206 (N.D. Ohio 1996) ("[I]t is clear that the action of state courts and their officers is regarded as action of the State within the fourteenth amendment."); *Commonwealth Natural Res. and Envt'l Prot. Cabinet v. Kentec Coal Co.*, 177 S.W.3d 718 (Ky. 2005) (holding that equal protection clause applied to all government activity, including judicial action).

B. State Court Actions Have Been Found to Violate Other Aspects of The Constitution Through the Fourteenth Amendment.

In addition to finding that the judiciary can violate the Fourteenth Amendment's application of Due Process and Equal Protection to the States, other provisions of the Constitution have been used to check judicial action through the Fourteenth Amendment.[5]

For example, in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court of Alabama's libel judgment against the New York Times was held to violate the paper's First Amendment rights, as incorporated through the Fourteenth Amendment's Due Process Clause. Similarly, the D.C. Circuit acknowledged this application of the First Amendment to judicial actions in *Edwards v. Habib*, 397 F.2d 687, 699 (D.C. Cir. 1968), where it determined that a state court could not uphold the eviction of a tenant in retaliation for reporting housing code violations. The court explained that "[a] state court judgment . . . may unconstitutionally abridge the right of free speech as well as the right to equal protection of the laws." *Id.* at 694.

Likewise, this Court has held that state court criminal sentences may violate the Eighth Amendment. In *Solem v. Helm*, 463 U.S. 277, 290-92 (1983), the question was whether the South Dakota

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[5] *See, e.g. Duncan v. State of La.*, 391 U.S. 145 (1968) (holding that state court violated the Sixth Amendment and Fourteenth Amendment by refusing to provide jury trial in a criminal case).

Supreme Court's affirmance of a life sentence for "uttering a 'no account' check for $100" was cruel and unusual punishment. Relying on the established common law principle that punishment must be proportionate to the crime, the Court held that the excessive sentence issued by the state judicial branch violated the Eighth Amendment. *Id.*

Finally, the imposition of constitutional restraints on judicial decisions does not stop with the Bill of Rights. In *Muhlker v. New York & Harlem R.R. Co.*, 197 U.S. 544 (1905), the Court determined that a New York appeals court decision that infringed on a property owner's easement violated the Contract Clause. The property owner asserted that the elimination of an established property interest by the state judiciary violated both the Contracts Clause and the Fourteenth Amendment.[6]

* * *

Therefore, as shown above, the Court has steadily held that the "state action" requirement of the Fourteenth Amendment applies to judicial action in the same manner as it applies to legislative and executive action.

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[6] In addition to emphasizing that state courts could not take away rights "acquired by contract," the Court explained that the public interest "is not more necessary to the making of a city than the rights to light and air, held . . . in individual ownership . . . and asserted only as rights of private property." *Id.* at 571; Walston, *supra* note 2 at 427 ("*Muhlker* suggests that the Constitution restricts the courts' authority to change their definitions of property rights.").

C. The Takings Clause is Applicable to the States Through the Fourteenth Amendment.

This Court has also consistently held that the Fifth Amendment's Takings Clause is applicable to the states through the Fourteenth Amendment.[7] *Chicago, B. & Q. R.*, held that the Fourteenth Amendment Due Process Clause incorporates the Fifth Amendment Takings Clause, thereby mandating that state governments pay compensation when they take private property for public use. *Id.* at 236. Additionally, *Chicago, B. & Q. R.* provides that states violate the Fourteenth Amendment when property is unlawfully taken, regardless of what branch of government affects the taking. *Id.* at 235. Justice Harlan explained:

> If compensation for private property taken for public use is an essential element of due process of law as ordained by the Fourteenth Amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the state, within the meaning of that amendment.

Id. Thus, pursuant to *Chicago, B. & Q. R.*, the Taking Clause is incorporated into the Fourteenth

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[7] *See Webb's Fabulous Pharmacies, Inc. et al. v. Beckwith*, 449 U.S. 155 (1980) (county's actions violated the Fifth and Fourteenth Amendments by unlawfully appropriating private money).

Amendment and state courts can be liable for its violation.

* * *

Accordingly, in the case at bar, there is no reason for the Court to depart from *Chicago, B. & Q. R.* It should affirm that because the Takings Clause is incorporated into the Fourteenth Amendment, and the Fourteenth Amendment may be violated by judicial action, it follows that the Takings Clause may be violated by state judicial action. There is no reasoned principle to relegate the Takings Clause to the "status of a poor relation," and somehow immunize state courts from the obligation to pay compensation when their actions rise to the level of a Fifth Amendment infraction.[8]

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[8] *See Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994).

II. THE COURT SHOULD NOT VIEW THE JUDICIARY ANY DIFFERENTLY THAN THE EXECUTIVE OR LEGISLATURE WHEN APPLYING THE TAKINGS CLAUSE.

As the legislative and executive branches are considered to be components of state governments, so is the judiciary.[9] There is no policy reason that the judiciary should be treated differently than the other two branches for purposes of the Takings Clause.

A. The Judiciary is a Division of the State.

The acts of a state court should not be viewed in isolation. A court is not an entity unto itself, but a component of the State along with the executive and legislative branches.[10] In Florida specifically, the powers of the government are "divided into legislative, executive and judicial branches." Fla. Const. art. II, § 3. Takings for "public use" that result from executive or legislative action are acts of the State, and trigger the constitutionally-compelled remedy of just compensation.[11] Similarly, if a judicial

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[9] *See Mistretta v. United States*, 488 U.S. 361 (1989) (separation of powers principle is based on distribution of power among different branches of government); *Ind. Wholesale Wine & Liquor Co., Inc. v. State ex rel. Ind. Alcoholic Beverage Comm'n*, 695 N.E.2d 99 (Ind. 1998) (judiciary is but one of three coequal branches of government).

[10] *Ex parte Commonwealth of Virginia*, 100 U.S. 339, 347 (1879) ("A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way.").

[11] The "public use" requirement is thus coterminous with the scope of a sovereign's police powers. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984); *see also Kelo v. City of New*

decision results in the deprivation of private property for public use, it is the public that benefits.[12] In the case below, the public that utilizes the newly created beach will benefit from the Florida Supreme Court's decision. As the public is the ultimate beneficiary, the responsibility to redress the taking lies ultimately with the state government.[13] No branch of the government should be allowed to "forc[e] some people alone to bear the public burdens to which, in all fairness and justice, should be borne by the public as a whole."[14]

London, 545 U.S. 469, 483-84 (2005) (upholding "an economic development plan that . . . provide[d] appreciable benefits to the community . . .."); *Thompson v. Consol. Gas Utils. Corp.*, 300 U.S. 55, 80 (1937) (providing "one person's property may not be taken for the benefit of another private person," unless there is a public purpose); *Members of Peanut Quota Holders Ass'n, Inc. v. United States*, 421 F.3d 1323, 1330 (Fed. Cir. 2005) (providing that takings occur when property interests are "appropriated by the government for the *benefit of the public*.") (emphasis added).

[12] "The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid state statute. The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government." *Brinkerhoff-Faris*, 281 U.S. 673, 680 (1930).

[13] *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal.*, 482 U.S. 304, 321 (1987) ("Once a court determines that a taking has occurred, *the government* retains the whole range of options already available.") (emphasis added).

[14] *Armstrong et al. v. United States*, 364 U.S. 40, 49 (1960); *see also Pa. Coal Co. v. Mahon et al.*, 260 U.S. 393, 416 (1922) ("[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for change.")

The ideas that a state court is an entity exempt from Constitutional limitations, and that private property owners are not due "just compensation" if their property interests are eliminated by aberrant judicial determinations, is anathema. Such notions would permit the State to benefit through the device of judicial intervention in circumstances where similar actions by the executive or legislative branches would fail.[15] If the courts were used as shields for legislative or executive branch takings, then no private property interest could be protected from effective confiscation by the state, no matter how widely recognized or vested the interest might be. For example, a state court on its own might declare private home ownership to be non-existent. Yet, without recognition of a "judicial taking," there would be no Constitutional safeguard calling for the payment of compensation to owners whose homes were confiscated.

In assessing whether a constitutionally protected taking has occurred, courts should consider the actual result and effect of the State action, and not the source of the action. As Justice Brennan's influential plurality dissent explained, "[f]rom the property owner's point of view, it may matter little whether his land is condemned or flooded, or . . . restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it." *San Diego Gas & Elec. Co. v.*

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[15] "[L]egislatures and administrative agencies will use the courts as a means of sheltering numerous other changes from compensation." Thompson, 76 Va. L. Rev. at 1508.

San Diego, 450 U.S. 621, 652 (1981) (Brennan, J. dissenting).[16] Under a similar analysis, from a property owner's perspective it is irrelevant which branch of government causes his economic deprivation.[17]

To paraphrase Gertrude Stein, a taking, is a taking, is a taking.[18] It matters not if the culprit is the executive, the legislative, or the judicial branch.

B. If The State Judiciary Takes Private Property, The State Must Pay Just Compensation.

The fact that the judiciary has no power to appropriate money for payment is a red herring. Although the power to appropriate is limited to the legislature, the Takings Clause is applied to the executive without question.[19] In fact, judicial

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[16] The Alaska Supreme Court accurately captured this analysis, explaining that a taking "depends on whether someone has been deprived of the economic benefits of ownership, not whether the State captures any of those benefits." *Hageland Aviation Services, Inc. v. Harms*, 210 P.3d 444, 450 (Alaska 2009).

[17] *See Tulare Lake Basin Water Storage Dist. v. United States*, 61 Fed. Cl. 624, 630 (Fed. Cl. 2004) (providing that when determining just compensation courts should look at what was taken "from the point of view of the owner" not the government's.) (quoting *Pitcairn v. United States*, 547 F.2d 1106, 1122 (Ct. Cl. 1976).

[18] Gertrude Stein, *Sacred Emily, in* Geography and Plays 178 (University of Nebraska Press 1993) (1922).

[19] "[T]he legislature should not be able to evade the takings protections simply by delegating lawmaking power, but not the

decisions "often result in governmental expenditures in the name of compliance with the Constitution."[20]

III. THE COURT SHOULD LOOK AT THE SUBSTANCE OF A PROPERTY RIGHT TO DETERMINE WHETHER IT IS PROTECTED BY THE CONSTITUTION.

After confirming the concept of judicial takings, the Court must decide whether one occurred in this case. However, before resolving whether the Florida Supreme Court violated the Takings or Due Process clauses, the Court must determine whether the land owners held property rights protected by the Constitution.[21] It is well established that the Constitution does not create property rights, but that such rights come from an independent source "state law." *Bd. of Regents of State Coll. v. Roth*, 408 U.S. 564, 577 (1972). Nevertheless, the Court has never provided that state law is the sole source of property rights or that it must defer to state court findings to determine whether a protectable right exists.

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spending power with which to compensate takings, to the courts. If state courts have the lawmaking power to take property, states are obligated to establish some means of making compensation for such takings." W. David Sarratt, *Judicial Takings and the Course Pursued*, 90 Va. L. Rev. 1487 (2004).

[20] J. Nicholas Bunch, *Takings, Judicial Takings, and Patent Law*, 83 Tex. L. Rev. 1747, 1771 (2005).

[21] *See Lucas v. S.C. Coastal Council*, 505U.S. 1003, 1027 (1992) (a court must look at a property owner's "bundle of rights" to determine whether a taking occurs.); *Conti v. United States*, 291 F.3d 1334, 1339 (Fed. Cir. 2002) (the first part of a takings analysis is whether the claimant holds a "property interest.").

In *United States v. Craft*, 535 U.S. 274 (2002), this Court established a paradigm for determining whether a property right exists under a federal statute. NAHB suggests that this paradigm is appropriate to determine whether a property right is protectable under the Constitution.

In *Craft*, a husband who owned real property as a tenant by the entirety failed to pay income tax for seven years. Subsequently, the Internal Revenue Service (IRS) assessed him $482,446 for unpaid tax liabilities, which he also failed to pay. *Id.* at 276. Pursuant to 26 U.S.C. § 6321, the IRS thus attached a federal tax lien to "all property and rights to property . . ." belonging to the husband. *Id.*

The issue in *Craft* was whether a tenant by the entirety possessed "property" or "rights to property" as those terms were used in 26 U.S.C. § 6321. The Court of Appeals for the Sixth Circuit, relying on state law, found that a federal tax lien could not attach to the property, because under Michigan law "the husband had no separate interest in the property...." *Craft*, 535 U.S. at 277.

This Court reversed. The majority explained that the question of whether the husband's interest constituted "property or rights to property" was "ultimately a question of federal law." *Id.* at 278. However, because the federal tax lien law created no property rights, the answer depended on state law. Accordingly, the Court "look[ed] initially to state law to determine what rights the taxpayer [had] in the

property . . . then to federal law to determine whether the taxpayer's state-delineated rights qualifi[ed] as 'property' or 'rights to property' . . ." *Id.* (quoting *Drye v. United States*, 528 U.S. 49, 58 (1999)).

In determining that the husband's interest was "property or rights to property," the Court was "careful to consider the *substance of the rights* state law provides, *not merely the labels* the State gives these rights or the conclusions it draws from them." *Id.* at 279 (emphasis added). In so doing, it reviewed the history of tenancies in the entirety and all of the privileges that attached to the property, such as the right to use the property, the right to exclude others, the right to share income, and the right to survivorship. *Id.* at 280-82. Ultimately, the Court found that the husband held rights that were "property or rights to property" under the federal tax lien law, even though under Michigan law he held no separate right to the property. *Id.* at 288.

In the case at bench, to determine whether the littoral owners held property protected by the Constitution, NAHB respectfully suggests the Court follow the analysis it developed in *Craft*. Similar to the federal tax lien statute, the Constitution does not create property rights. Thus, the Court should look to Florida law to determine the rights that the littoral owners held, and then to the Constitution to determine whether the rights qualify as protectable property. *See Craft*, 535 U.S. at 278.

The Florida Supreme Court labeled the property owners' littoral rights to access, use, and view as "easements" and the right to accretion as a "contingent future interest." *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So.2d 1102, 1112 (Fl. 2008). It then found that the right to accretion was not implicated by the Beach and Shore Preservation Act and that littoral owners had no "independent right of contact with the water." *Id.* at 1119.

As in *Craft*, the Court should not simply accept the Florida Supreme Court's conclusions on whether the littoral owners held protectable property rights. It must evaluate the substance of the rights. *Craft*, 535 U.S. at 279. For example, the Court should determine on its own whether, as littoral owners, the Petitioners possessed a right to acquire additional property by accretion and to have their property adjoin the water. Further, the Court should also resolve whether it is the State, or the littoral property owners, that have the right to reclaim land lost by an avulsive event. Only after resolving what rights the littoral owners held can the Court decide whether they are protected by the Constitution.

CONCLUSION

For the reasons stated above, the Court should clarify that a judicial action can take property without compensation in violation of the Fifth Amendment. In addition, the Court should review the substance of the Petitioners' littoral rights to

determine if they are constitutionally protected property.

Respectfully submitted,

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APPENDIX A

Cases in which NAHB has appeared as an *amicus curiae* or "of counsel" before this Court include:

Agins v. City of Tiburon, 447 U.S. 255 (1980); *San Diego Gas and Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Ore.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Franconia Assocs. v. United States*, 536 U.S. 129 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Kelo v. City of New*

London, 545 U.S. 469 (2005); *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370 (2006); *Rapanos v. United States*, 547 U.S. 715 (2006); *NAHB v. Defenders of Wildlife*, 55 U.S. 644 (2007); *John R. Sand and Gravel Co. v. United States*, 551 U.S. 130 (2008); *Summers v. Earth Island Inst.*, 129 S. Ct. 1142 (2009); *Entergy Corp. v. Envtl. Prot. Agency*, 129 S. Ct. 1498 (2009); and *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365 (2008); *Coeur Alaska, Inc. v. Southeast Alaska Cons. Council*, 129 S. Ct. 2458 (2009).

AMICUS CURIAE BRIEF

005-47K4NW
(8)

SUPREME COURT, U.S.
FILED
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No. 08-1151

In the
Supreme Court of the United States

STOP THE BEACH RENOURISHMENT, INC.,
Petitioner,
v.
FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND, WALTON COUNTY, and CITY OF DESTIN,
Respondents.

On Writ of Certiorari to the
Florida Supreme Court

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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August 20, 2009

QUESTION PRESENTED

Should the Court recognize a "judicial taking," which would invalidate, under the Fifth and Fourteenth Amendments to the U.S. Constitution, a state court's decision that has departed abruptly from that court's own precedents and has eliminated a vested property right without providing just compensation?

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MISCELLANEOUS

James L. Huffman, *Beware Of Greens In Praise Of The Common Law*, 58 Case W. Res. L. Rev. 813 (2008) 7

INTEREST OF AMICUS CURIAE

Amicus curiae New England Legal Foundation ("NELF") seeks to present its views and the views of its supporters on whether this Court should recognize a judicial taking, which would hold state courts accountable under the Fifth and Fourteenth Amendments to the U.S. Constitution when they depart unexpectedly from their own precedents and eliminate a well-settled property right without providing just compensation.[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include a cross-section of large and small businesses from all parts of New England and the United States.

NELF has regularly appeared as amicus curiae in this Court in cases raising issues of general economic significance to New England's property

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3(a), counsel for amicus have filed herewith written consent from counsel for each party for the filing of amicus briefs.

owners and business communities.[2] This is such a case, and NELF believes that this brief provides an additional perspective that could aid the Court in deciding the issue presented in this case.

SUMMARY OF ARGUMENT

This Court has long recognized that the Takings Clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment, applies to a state's judiciary as well as to the state's legislative and executive branches. However, the precise contours of the Takings Clause's application to judicial decisions affecting common law property rights remain unclear. This case presents the Court with the opportunity to recognize a judicial taking, as articulated in Justice Stewart's powerful concurrence in *Hughes v. Washington*, 389 U.S. 290 (1967), and hold that where, as here, a state court departs abruptly and unforeseeably from clear

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[2] *See, e.g., Hall Street Assocs., L.L.C., v. Mattel, Inc.*, 128 S. Ct. 1396 (2008); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007); *Rapanos v. United States*, 547 U.S. 715 (2006); *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370 (2006); *Kelo v. City of New London*, 545 U.S. 469 (2005); *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005); *Comm'r v. Banks*, 543 U.S. 426 (2005); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); and *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

precedent and eliminates well-established property rights, such a decision is a taking requiring just compensation under the Fifth and Fourteenth Amendments. Such a holding would be entirely consistent with the Court's long history of reviewing and reversing court decisions that change or eliminate constitutionally protected interests.

The Court's adoption of Justice Stewart's judicial taking analysis in *Hughes* would also be consistent with the general and time-honored principle that state courts may not circumvent the Constitution by invoking purported state-law grounds that actually lack "fair or substantial support" in state law and therefore constitute state judicial evasion of federal rights. Justice Stewart's judicial taking test, as articulated in *Hughes*, should be viewed within this larger doctrinal context of "fair or substantial" review as but a particular application of this established standard in the takings context.

ARGUMENT

I. The Court should recognize a judicial taking where, as here, a state court has abruptly eliminated a vested property right based on purported state-law grounds that lack "fair or substantial support" in state law.

This case presents the Court with the opportunity to embrace Justice Stewart's eloquent articulation of the test for a judicial taking in his

concurrence in *Hughes v. Washington*, 389 U.S. 290 (1967), and to align this test with the Court's power to review a state court decision implicating a federal constitutional right to determine whether there is "fair or substantial support" in state law to defeat the enforcement of that right:

> [W]e have long held that this Court has an independent obligation to ascertain whether a judgment defeating the enforcement of federal rights rests upon a valid nonfederal ground and whether that ground finds *"fair or substantial support"* in state law. . . . The reasons for that rule rest on nothing less than this Court's ultimate authority to review state-court decisions in which "any title, right, privilege, or immunity is specially set up or claimed under the Constitution." 28 U.S.C. § 1257(a); see *Martin v. Hunter's Lessee*, 1 Wheat. 304, 4 L.Ed. 97 (1816). "To hold otherwise would open an easy method of avoiding the jurisdiction of this court." *Terre Haute & Indianapolis R. Co. v. Indiana ex rel. Ketcham*, 194 U.S. 579, 589, 24 S.Ct. 767, 769, 48 L.Ed. 1124 (1904) (Holmes, J.).

Howlett By and Through Howlett v. Rose, 496 U.S. 356, 366 n.14 (1990) (emphasis added) (questioning adequacy of Florida court's expansive application of Florida precedent interpreting state sovereign

immunity law as requiring dismissal of § 1983 claims against county school board and officials sued in state court, when same parties would be amenable to § 1983 suit in federal court: "That holding raises the concern that the state court may be evading federal law and discriminating against federal causes of action.") (*Id.*, 496 US. at 366).[3]

As developed further below, a synthesis of Justice Stewart's concurrence in *Hughes* with this well-established "fair or substantial" review of the

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3 *See also Broad River Power Co. v. South Carolina ex rel. Daniel*, 281 U.S. 537, 540-541 (1930):

> Whether the state court has denied to rights asserted under local law the protection which the Constitution guarantees is a question upon which the petitioners are entitled to invoke the judgment of this Court. Even though the constitutional protection invoked be denied on nonfederal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon *a fair or substantial basis*. If unsubstantial, constitutional obligations may not be thus evaded. But, if there is no evasion of the constitutional issue, and the nonfederal ground of decision has fair support, this Court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule for that of the state court.

adequacy of state-law grounds could yield the following comprehensive standard of review: A state court decision that eliminates long-held property rights should constitute a judicial taking when the decision lacks "fair or substantial" support in state law such that it constitutes "a sudden change in state law, unpredictable in terms of the relevant precedents." *Hughes*, 389 U.S. at 296 (Stewart, J., concurring). Under this standard of review, the Florida Supreme Court's decision should be struck as an unconstitutional judicial taking of the petitioner's members' littoral rights.[4]

This Court has long recognized that the Takings Clause of the Fifth Amendment applies to the judicial as well as to the legislative and executive branches of state government. *See, e.g., Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (stating that, where county's taking of interest earned on private interpleader account was held to be unconstitutional, "[n]either the Florida Legislature by statute, *nor the Florida courts by judicial decree*, may accomplish the result the county seeks . . . .") (emphasis added); *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226 (1897) (declaring that "a judgment of a state court . . . whereby private property is taken for the state or under its direction for public use, without

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4 NELF relies upon petitioner's thorough and persuasive discussion of Florida property law in its brief on the merits to assert that the Florida Supreme Court's decision lacks a "fair and substantial" basis under that court's own precedents. *See* Petitioner's Brief, at 20-34.

compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the 14th Amendment . . . "). *See also Hughes*, 389 U.S. at 298 (1967) (Stewart, J., concurring) ("[T]he Due Process Clause of the Fourteenth Amendment forbids . . . confiscation [of private property] by a State, no less through its courts than through its legislature").

However, the precise contours of the Takings Clause's application to judicial decisions affecting common law property rights have remained unclear, until now. This case should be recognized as the prototypical judicial taking, because a state court has departed abruptly from clear precedents and has eliminated a vested property right without providing just compensation. *See Hughes v. Washington*, 389 U.S. at 296-298 (Stewart, J., concurring).

To be sure, property rights are typically a matter of state law, and state courts should be generally free to shape and mold these rights gradually, from case to case, without federal interference.[5] See James L. Huffman, *Beware Of*

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5 *See Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 681 n.8 (1930) (Brandeis, J.) ("The process of trial and error, of change of decision in order to conform with changing ideas and conditions, is traditional with courts administering the common law. Since it is for the state courts to interpret and declare the law of the State, it is for them to correct their errors and declare what the law has been as well as what it is. State courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guaranties, even though parties may have acted to their prejudice on the faith of

Greens In Praise Of The Common Law, 58 Case W. Res. L. Rev. 813, 843 (2008) ("[T]he history of the common law reflects gradual, purposeful and constrained development."). However, where, as here, a state court effects a sudden, drastic and unexpected departure from its own precedent by discarding well-established property rights, the Takings Clause should apply with full force. In his concurring opinion in *Hughes v. Washington,* Justice Stewart articulated precisely this rationale for holding state courts accountable under the Takings Clause when they effectively confiscate well-established property rights without providing just compensation:

> [T]o the extent that [a state court's decision] constitutes a *sudden change in state law, unpredictable in terms of the relevant precedents*, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of *asserting*

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the earlier decisions."); *Patterson v. Colorado,* 205 U.S. 454, 461 (1907) (Holmes, J.) ("[There is] no constitutional right to have all general propositions of law once adopted [by state courts] remain unchanged"; "in general, the decision of a court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the Fourteenth Amendment merely because it is wrong or because earlier decisions are reversed").

> *retroactively that the property it has taken never existed at all.*"

Hughes, 389 U.S. at 296-297 (Stewart, J., concurring) (emphasis added).

Amicus urges the Court to adopt Justice Stewart's reasoning in *Hughes* and hold that, where, as here, a state court effects an abrupt and unforeseeable departure from precedent that eliminates well-established property rights, such a decision is a taking requiring just compensation under the Fifth and Fourteenth Amendments.[6] This view would be consistent with the Court's long recognition of the importance of protecting property owners' settled expectations in their rights of ownership from uncompensated governmental interference. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (extent to which governmental action interferes with reasonable

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6 As with the Florida Supreme Court decision here, Justice Stewart in his *Hughes* concurrence explained that the Washington Supreme Court in that case "[o]f course . . . did not conceive of [its] action as a taking" when it departed from its own precedent and held that the beachfront owner had no property right to accreted lands; the "Constitution [nevertheless] measures a taking of property not by what a State says, or by what it intends, but by what it *does*." *Hughes*, 389 U.S. at *Id.* at 298 (emphasis in original). The key inquiry then becomes whether a state court has, in the guise of a decision purporting merely to apply established principles of property law, in fact departed abruptly and unforeseeably from its own precedent and has thereby effectively confiscated a property right without just compensation.

"investment-backed expectations" is relevant consideration in regulatory takings analysis). Moreover, the Court has long reviewed and reversed state court decisions that change or eliminate constitutionally protected property interests. *See Muhlker v. New York & Harlem R.R.*, 197 U.S. 544, 570 (1905) (state courts' power to "declare rules of property or change or modify their decisions" may not be "exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States").

Adoption of Justice Stewart's takings analysis in *Hughes* would also be consistent with the Court's long recognition that retroactive judicial interference with well-settled property rights is fundamentally at odds with due process of law. *Cf. Eastern Enter. v. Apfel*, 524 U.S. 498, 548-49 (Kennedy, J., concurring) ("If retroactive laws change the legal consequences of transactions long closed, the change can destroy the reasonable certainty and security which are the very objects of property ownership. As a consequence, due process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity."). In the analogous area of federal patent law, the Court has admonished the lower federal courts to avoid making abrupt changes to a patent holder's rights in order to preserve settled property expectations. See *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 739 (2002) ("[C]ourts must be cautious before adopting changes that disrupt the settled expectations of the [patent-holding] inventing community. . . .

Fundamental alterations in these rules risk destroying the legitimate expectations of inventors in their property.").

Finally, as discussed above, the Court's adoption of Justice Stewart's judicial taking analysis would be consistent with the fundamental principle that state courts must not be allowed to circumvent the Constitution by invoking purported state-law grounds that actually lack "fair or substantial support" in state law. *See Howlett By and Through Howlett v. Rose*, 496 U.S. at 366 n.14; *Broad River Power Co. v. South Carolina*, 281 U.S. 537, 540-541 (1930). Justice Stewart's judicial taking test should therefore be understood as a particular application of this well-settled "fair or substantial" standard of review, under which the Court has held state courts accountable to the Constitution by reviewing the adequacy of state-law grounds on which a state court has based its decision not to address federal constitutional challenges to state action. Justice Stewart's judicial taking analysis merely illustrates the principle that "[t]he adequacy of the state-law ground to support a judgment precluding litigation of the federal claim is itself a federal question which we review *de novo*." *Howlett*, 496 U.S. at 366.

As with Justice Stewart's judicial taking standard, the purpose of "fair or substantial" review is to allow the Court to penetrate the façade of a state court decision where, as here, the state court purports merely to apply established state law in concluding that no federal constitutional right is

implicated.[7] The inquiry allows the Court to determine whether the state-law grounds that a state court invokes are with or without foundation and, therefore, whether the decision offends the Constitution. As the Court has further explained:

> Whether the constitutional rights asserted by petitioner were given due recognition by the [state court] is a question as to which the [petitioner is] entitled to invoke our judgment . . . . It therefore is within our province to inquire not only whether the right was denied in express terms, but also *whether it was denied in substance and effect, as by putting forward nonfederal grounds of decision that were without any fair or substantial support.*

Staub v. City of Baxley, 355 U.S. 313, 318-319 (1958) (rejecting adequacy of state-law grounds, such as lack of standing, for state supreme court's refusal to reach facial First Amendment challenge to city criminal ordinance requiring permit to solicit workers to organize) (emphasis added).

Therefore, Justice Stewart's concurrence in *Hughes* should be viewed within this larger doctrinal context of "fair or substantial" review and should be readily accepted as but a particular application of this standard in the takings context. Moreover, the language of his concurring opinion in *Hughes* should

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7 See n. 6, above (discussing same).

be further enriched by this larger doctrinal context to yield the suggested standard of review with which amicus began its brief, and which bears repeating: A state court decision that, as in this case, eliminates long-held property rights should constitute a judicial taking when the decision lacks "fair or substantial" support in state law such that it constitutes "a sudden change in state law, unpredictable in terms of the relevant precedents." *Hughes*, 389 U.S. at 296. Accordingly, the Florida Supreme Court decision should be struck as a judicial taking in violation of the U.S. Constitution.

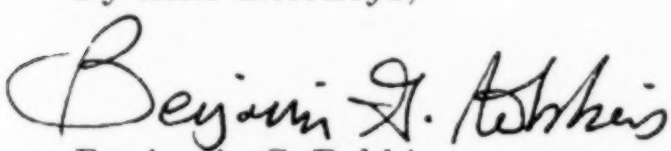
CONCLUSION

For the reasons stated above, NELF respectfully requests that this Court reverse the Florida Supreme Court's opinion and remand this case for further proceedings consistent with the Court's decision.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION

By their attorneys,



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August 20, 2009

AMICUS CURIAE BRIEF

005-4ZK4VS (14)

No. 08-1151

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

STOP THE BEACH RENOURISHMENT, INC.,
Petitioner,

v.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND, WALTON COUNTY AND CITY OF DESTIN,
Respondents.

On Writ of Certiorari to the Florida Supreme Court

BRIEF OF *AMICUS CURIAE* OF THE NEW JERSEY LAND TITLE ASSOCIATION IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* OF THE NEW JERSEY LAND TITLE ASSOCIATION IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

The New Jersey Land Title Association (hereinafter "NJLTA") is a trade association advancing the interests of those involved in the real estate title insurance industry in New Jersey.[1] The members of

[1] Consistent with the requirements of Rule 37, a blanket letter of consent to the filing of Amicus briefs was filed with the Clerk of the Supreme Court by way of a correspondence to the

the Association include – among others – more than ninety percent of the title insurance underwriting companies licensed to do business in the State. Those insurers alone are a significant cornerstone of the national economy. Nationally, in 2007 alone, NJLTA insurers insured over four trillion dollars of real estate.[2]

The insurance issued by such companies insures that title to real estate is good and free of encumbrances. Joyce Palomar, *Title Insurance Law*, Vol. I, § 1.8 (2008). Such insurance allows buyers to invest in real estate with confidence. Moreover, that confidence has a multiplier effect. Title insurance not only helps "buyers to buy" but it helps sellers to sell, lenders to lend, brokers to transact, builders to build, industries to expand and so on. Thus, the overall economic impact of title insurance is great.

Title insurance itself is unique. Unlike casualty insurance – which insures against *unknown future events* such as accidents or storms – title insurance deals with *known events* of the past. Joyce Palomar, *Title Insurance Law*, Vol. I, §§ 1.15, 1.16 (2008). It insures, for instance, that a seller's title to real estate

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Clerk of the Supreme Court dated July 7, 2009 from D. Kent Safriet, counsel for the Petitioner, confirming the blanket consent of all parties to the filing of Amicus briefs. Pursuant to Rule 37.6, counsel for Amicus states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus their members or their counsel made a monetary contribution to its preparation or submission.

[2] Statistics compiled from insurer annual statements on file with the State of New Jersey, Department of Banking and Insurance.

can be seamlessly traced backwards in time to a point beyond the statute of limitations for claims against that title. Lawrence Joel Fineberg, *Handbook of N.J. Title Practice*, Vol I, § 803 (3d ed. 2007). This allows purchasers of real estate to purchase property with assurance as to what they are receiving.

A prerequisite to the issuance of title insurance is a search of the title history of the property. Joyce Palomar, *Title Insurance Law*, Vol. I, § 1.16. The title search in turn entails, among other things, an analysis of recorded legal documents in light of known rules of law so that the title insurer can conclude that insuring the property is acceptably free of risks. Lawrence Joel Fineberg, *Handbook of N.J. Title Practice*, Vol. I, § 1005.

Thus, title insurance, unlike other forms of insurance, focuses more on an analytical risk-elimination rather than a risk-assumption, such as happens with casualty insurance. Joyce Palomar, *Title Insurance Law*, Vol. I, § 1.15. While the title searches designed to eliminate risks will generate increased operating expenses – if those title searches demonstrate minimal levels of risk – title insurance can be issued at relatively low cost and with a high degree of confidence. Palomar, *Id.*

Low risk, low premiums and high confidence are thus the very essence of the business model of title insurance. That business model accomplishes important societal objectives. It gives homeowners, investors, banks, businesses and others a low cost and proven way to insure their investments in land. Palomar, *Id.*

It is this very structure of the business model of title insurance that leads to NJLTA's interest in this

suit. Put simply, the retroactive re-allocation of property rights by judicial decisions can be disastrous to the title insurance industry. By retroactively taking away interests in property, such decisions manufacture claims against title insurance carriers whose business model is ill equipped to handle them. Such decisions nullify "risk elimination" and creates situations where title insurance companies operate with high operating expenses, low premiums and potentially high claims expenses. That is a threat both to the title insurance industry and to the individuals – be they homeowners, businessmen, developers or investors – who rely on the title industry to insure their investments.

Herein, the Florida Supreme Court retroactively re-allocated property rights for the apparent purpose of effectuating policy objectives. NJLTA seeks to address the constitutionality of the Florida Supreme Court's action. Just like a property owner, NJLTA has an interest in assuring that the law protects established rights in property. Put bluntly, title insurance companies simply cannot do business if precedent regarding real property is treated as nothing more than window dressing.

Accordingly, this Court's decision is important in that it directly impacts on the title insurance industry and the way it provides a pivotal service to commerce in real estate.

SUMMARY OF ARGUMENT

Under Florida law, a waterfront owner's rights included a package of "littoral rights" such as the right to maintain the property's contact with the water and the right to ownership of accretions of sand to the upland parcel. A long line of Florida

decisions had given "littoral rights" a special place in Florida law. Precedent had informed the citizenry that such rights could not be taken away without "just compensation."

Recently, however, the State of Florida by statute has replaced these common law rights of littoral ownership with a statutory plan designed to deal with the problem of waterfront erosion. In doing so, the statute took away two valuable common law rights of waterfront owners, to wit, the upland owner's contact with the water and the owner's right to accretions of sand to the waterfront.

Apparently in order to effectuate the new statutory beach protection plan, the Florida Supreme Court held that such rights could indeed be taken away without compensation. In order to deal with past precedent to the contrary, the Court simply declared that they the rights taken had never existed in the first place.

Precedent is supposed to provide a guidepost pointing with reasonable directness towards conclusions upon which men and women can base their lives and guide their fortunes. That purpose is ill served when the reasonably entertained expectations of the citizenry are violated by decisions based more upon pretext than precedent. And when the negation of long standing precedent has the effect of transferring significant property rights from a citizen to the State, such actions should be treated as what they truly are – a taking - regardless of the fact that the agency effectuating the taking is a judicial body rather than a legislature.

ARGUMENT

I. DEPRIVING CITIZENS OF SIGNIFICANT AND ESTABLISHED PROPERTY RIGHTS CONSTITUTES A TAKING UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The Fifth Amendment's prohibition against takings of private property for public use are applicable to the States through the Fourteenth Amendment. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 306-307 (2002). The final sentence of the Fifth Amendment itself prohibits such "takings" without the payment of just compensation. *U.S. CONST. Amend.V.* These two Amendments neither prohibit the Congress nor any State Legislature from passing laws changing property rights. But legislation which – without compensation – transfers existing, long recognized and significant property rights from a citizen to the State is a violation of the Constitutional protections given by those amendments. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980).

Amicus will argue that the uncompensated takings – forbidden to legislatures – are equally forbidden to state judiciaries. What cannot be done directly by legislature, cannot be done indirectly by judicial degrees abrogating existing, long-recognized and significant property interests of citizens in favor of the State.

II. THE COMPLETE AND UNANTICIPATED REVERSAL OF LONG STANDING PRINCIPLES OF PROPERTY LAW BY THE FLORIDA SUPREME COURT CONSTITUTED A TAKING WITHIN THE MEANING OF THE FIFTH AND FOURTEENTH AMENDMENTS.

This Point Two will argue the following:

One, the Florida Supreme Court did not interpret or reconcile existing precedent in order to resolve a disputed legal issue in a pending case. Rather, the court simply reversed two separate and long standing principles of law in order to arrive at a pre-ordained result.

Two, the result of this was the transfer of valuable property rights from citizens to the State which, under the facts of this case, constituted a taking under the United States Constitution.

A. The Florida Supreme Court Abruptly Reversed Two Longstanding Principles Of Property Law.

1. The Florida Supreme Court Reversed Its Position On The Right Of A Littoral Owner To Receive Accretions To Land.

In 1987 the Florida Supreme Court held that a littoral's owners right to accreted sand was a property right which could not be taken away without "just compensation and due process of law..." *Board of Trustees of the Internal Imp. Trust Fund v. Sand Key Associates, Ltd.*, 512 So.2d 934, 936 (Fla. 1987). This right was not simply the right to ownership of sand already accreted but included "the right to

receive accretions and relictions to the property." *Sand Key Associates*, *supra*. (emphasis supplied) (citing *Brickell v. Trammell*, 82 So. 221 (Fla. 1919)). However, in the case under the review, the Florida Supreme Court held that "[t]he right to accretion and reliction is a contingent, future interest that only becomes a possessory interest if and when land is added to the upland by accretion or reliction." *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So.2d 1102, 1112 (Fla.2008). Based thereon the court held that the loss of the right to future accretions was not a compensable event. *Walton County*, *supra*. This was in direct contradiction to prior pronouncements of the court and it clearly defeased landowners of established rights.

2. The Florida Supreme Court Reversed Its Position On The Right Of A Littoral Owner To Maintain Contact With The Water.

In *Sand Key Associates*, the Florida Supreme Court was also specific about the right of a littoral owner to maintain contact with the water. The Court described that right as follows:

> Riparian and littoral property rights consist not only of the right to use the water shared by the public, but include the following vested rights ... the right of access to the water, including the right to have the property's contact with the water remain intact.

Sand Key Associates, *supra*. (Emphasis supplied).

However, when in deciding the case under consideration, the same court stated:

> We have never addressed whether littoral rights are unconstitutionally taken based solely upon

> the loss of an upland owner's direct contact with the water.

Walton County v. Stop the Beach Renourishment, Inc., supra.

The Court then went on to hold that no such right ever existed in the first place! *Walton County v. Stop the Beach Renourishment, Inc., supra.* The Court justified that conclusion by stating that the right of "contact" was subsidiary to the right of "access" and since "access" to the water was still available under the challenged statute, "contact" was irrelevant. *Walton County v. Stop the Beach Renourishment, Inc., supra.* However, these conclusions are completely unsupportable under Florida precedent for two reasons.

First, Florida's littoral law is based upon its incorporation of the common law after its admission to the union. *See e.g., Broward v. Mabry,* 58 So. 398, 407-410 (Fla. 1909); *Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors & Shippers*, 48 So. 643, 644-646 (Fla. 1909); *Hayes v. Bowman*, 91 So.2d 795, 798-800 (Fla. 1957). The common law, in turn, does not consider "contact" with the water to be a subsidiary to the right of access. Just the opposite is true. The very essence of the common law right inheres in contact with the water. Farnham's classic treatise on the common law of water and water rights states:

> The courts do not fully agree in their enumeration of these rights. Some concede more than do others; but the principles involved which will be developed in the course of this and succeeding chapters accord the owner of riparian land the right to have the water remain in place, and

> to retain, as nearly as possible, its natural character.

Henry Philip Farnham, *The Law of Waters and Water Rights*, Vol I § 62 (1904).[3]

Second, Florida precedent by its Supreme Court specifically affirmed that common law principle. It affirmed that littoral owners had "the right of access to the water, including the right to have the property's contact with the water remain intact..." *Sand Key, supra*. (emphasis supplied). Accordingly, prior to the decision under appeal, littoral owners could rest assured that they possessed both rights of "access" and of "contact." "Access" was not subsumed in "contact" but was a separate and distinct right in and of itself.

Nonetheless, the Florida Supreme Court held that there was no right to contact with the water under existing Florida law. Based thereon the Court held that the loss of the right to contact was not a compensable event. *Walton County, supra*. This, again, was in direct contradiction to prior pronouncements of the court and defeased landowners of established rights.

In looking at decision under review, the only conclusion that one can come to is that – for policy reasons – the Florida Supreme Court reversed its prior precedent and in doing so stripped owners of property rights while denying them compensation therefore. The Court did apparently did so in order to deal with the very real problem of beach loss in the

---

[3] *See also*, John M. Gould, *Law of Waters*, § 149 (3d. ed. 1900) (a riparian proprietor has the right to water frontage belonging by nature to his land).

State of Florida. However, as addressed in Point One B below, this action – no matter what its justification – constituted a taking under the United States Constitution.

B. The Lower Court's Decision Constituted A Taking Under The United States Constitution.

The United States Supreme Court has stated on numerous occasions that the Court has been unable "to develop any set formula for determining when justice and fairness require that economic injuries caused by public action" must be deemed a taking. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984). Supreme Court jurisprudence does, however, recognize different categories of takings and has developed case law within each category. For instance, regulatory takings occur when a regulation so intrudes upon a property owners rights in property that the property is considered taken despite the absence of a physical taking. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027-1031(1992). On the other hand, physical takings occur when all or even a part of a property is actually physically taken from an owner from public use. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425-426, 441 (1982) (landlord required to permit permanent installation of communications cable equipment on his property). A subset of the physical takings category involves situations where individual but significant property rights – out of the "bundle of rights" which constitute ownership – are taken from an owner without compensation. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). In such cases there exists no "permanent" occupation of the property but certain fundamental rights of ownership are, indeed,

permanently taken away. *Kaiser Aetna, supra.* (marina owner forced to grant public access to private lagoon). As discussed below, it is this last category that the present dispute falls into.

Here, no attempt has been made to "regulate" any part of the property owned by the upland owners. There has been no limitation placed upon the use of the property nor are there restrictions imposed upon its development. Cf. *Penn Cent. Transp. Co. v. City of New York,* 438 U.S. 104 (1978) (regulatory scheme limited the right to develop property 50 story office building over existing historical building). Simply put, there exists no regulatory scheme limiting what the affected owners can do with their properties and the cases dealing with regulatory takings are not apposite to the problem presented.

Similarly, there is no taking of a specific tangible portion of property of the type discussed in *Loretto, supra*. Instead, in this case, two of the rights of the owners herein – that of accretion and contact with the water – have simply been taken from the owners without compensation. That makes the present matter far more akin to cases involving the appropriation of specific rights of ownership than it is to a regulatory taking or a partial but permanent appropriation such as in *Loretto.*

Under Supreme Court precedent, the rights of ownership in land are sometimes referred to as a "bundle of rights" which taken together comprises the totality of "ownership." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). A significant appropriation of a portion of the rights in that "bundle" may constitute a compensable taking even if many of the other rights in the "bundle" remain. *Kaiser Aetna, supra* at 180. In the present case, two such rights of

ownership – contact with the water and accretion – were clearly appropriated by the State. The question arises: was that appropriation significant enough to constitute a taking?

Precedent supports the conclusion that it was.

For instance, in *Kaiser Aetna*, the government authorized public access to private waters. The Court explained such an action was a taking despite the fact that the government action did not destroy the total value of the land for other uses. The government's action was still a taking because the "right to exclude" others from one's property had been "universally held to be fundamental element" of property rights. *Kaiser Aetna*, *supra* at 179-180. Thus, by giving public access to private property the government's action had violated that significant right and constituted a taking. Similarly, in *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 162 (1980), this Court held that the interest accruing on principal held in an interpleader fund could not simply be appropriated by the State. Again, the State in *Webb* did not attempt "take" the principal of the fund held in the interpleader account, that amount was left intact. *Webb's Fabulous Pharmacies*, *supra* at 161. Nonetheless, the right to the interest on the principal was held to be such a significant incident of ownership of the principal that its appropriation constituted a "taking." *See, Phillips v. Washington Legal Foundation*, 524 U.S. 156, 166-167 (1998).

Importantly, the significant "incidents of ownership" found in cases like *Kaiser Aetna*, *Webb* and *Phillips* were not intellectual abstractions. They arose from an easily discernible foundation. That foundation was the traditional and long standing legal recognition of the importance of those rights.

For instance, in *Kaiser Aetna*, the Court noted that importance of the "right to exclude" was recognized universally as a crucial aspect of the rights of an owner. *Kaiser Aetna*, *supra* at 179-180. The same was found to be true about the inexorable relationship of interest-to-principal found in *Webb*. The inseparability of the right of interest from principal was quite simply a fundamental rule long recognized by State law. *See*, *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 166-167 (1998). Thus, in both cases the significance of the property right inhered in the traditional recognition of its importance by the law of the governmental entity seeking to appropriate it. *Kaiser Aetna*, *supra*; *Phillips v. Washington Legal Foundation*, *supra*.

Here, it is the same. It was the Florida courts themselves – prior to the decision below – that made it clear that littoral rights were important, essential, attributes of ownership of waterfront lands. These rights were, in fact, held to be so crucial that the Florida courts repeatedly stated that such rights could not be taken away without payment of compensation. For instance, as far back as 1909, the Florida Supreme Court made it specifically clear that riparian rights simply could not be taken "without just compensation." *Broward v. Mabry*, 50 So. 826, 830 (Fla. 1909). The Florida courts consistently have echoed that theme for decades. *Moore v. State Road Dept.*, 171 So.2d 25, 28 (Fla. Dist. Ct. App. 1965). Florida appellate courts have held this principle to extend specifically to cases involving the destruction of riparian rights by virtue of the filling of submerged lands as has happened here. *Kendry v. State Road Dept.*, 213 So.2d 23, 27-28 (Fla. Dist. Ct. App. 1968). In fact, in one Florida Supreme Court case it was

stated that the right to receive accretions and the right to remain in contact with the water were:

> ...property rights that may be regulated by law, but may not be taken without just compensation and due process of law ...

Sand Key Associates, *supra* at 936.

And in *State v. Florida Nat. Properties, Inc.*, 338 So.2d 13, 18 (Fla. 1976), the Florida Supreme Court held that the State's attempt to deny the right of accretion to an upland owner would amount an unconstitutional taking "in violation to the due process clause of the Fourteenth Amendment of the United States Constitution and the due process clause of Art. I, § 9, of the Florida Constitution." *State v. Florida Nat. Properties*, *supra* at 17. Thus – as in *Kaiser Aetna*, *Webb* and *Phillips* – the announced law of the entity seeking to appropriate the rights in question has itself defined those rights as fundamental.

Now, certainly, gifted legal minds could posit subtle distinctions between the case under review and cases like *Sand Key* and *State v. Florida Nat. Properties*. Based upon such subtle distinctions a person so inclined could engineer a conclusion that the quotes noted above (and in other Florida precedent) constituted obiter dictum, rather that ratio decidendi. But there is one conclusion that no one – no matter how gifted in exposition – could dispute. A person conducting an honest and good faith review of Florida case law (prior to the decision under appeal) would, of necessity, believe that littoral rights were powerfully protected interests under Florida law. Precedent had created clear expectations that littoral rights were not simply important – they were

sacrosanct. They could not be taken without just compensation.

But here – after littoral owners invested in property possessed of such littoral rights – the Florida judiciary simply reversed itself to the detriment of those owners. Put bluntly, the Florida Supreme Court first proclaimed such rights to be significant, important and protected, but later proclaimed that those identical rights were insignificant. In fact, it went further, it proclaimed that such rights had never existed in the first place!

But private rights cannot be transformed into public assets by word play. *Webb's Fabulous Pharmacies*, *supra* at 164. And it will be argued below that this result should be no different simply because the agent effectuating the change is a court instead of a legislature.

III. A JUDICIAL TAKING IS NO LESS A TAKING WITHIN THE MEANING OF THE FIFTH AND FOURTEENTH AMENDMENTS THAN AN ACT OF THE LEGISLATURE.

The Fifth and Fourteenth Amendments are not, by their terms, limited in application to legislative bodies. *Hughes v. State of Washington*, 389 U.S. 290, 298 (1967) (Stewart, J. Concurring). There is no reason, in principle, why judicial actions should not fall within their ambit. *Hughes*, *supra*. However, three arguments have been made against the application of the requirements of those amendments to the courts. They are: 1.) such a rule would bar courts from revising property law to meet social and technological changes, 2.) it would constitute a federalization of areas of law constitutionally within the states'

domain, and 3.) it would vastly expand the workloads of federal courts. Barton H. Thompson, *Judicial Takings*, 76 *Va.L.Rev.* 1449, 1499-1514 (2004).

But identical objections could be made with equal logic to the application of fourteenth amendment protections to legislation. *Thompson*, *supra* at 1534-1535. And the application of the Constitution's requirements to legislation has simply resulted in the accommodation of legislative policies to the obligation of protecting individual rights. There is no reason to suppose that state judiciaries are so fundamentally lacking in their expertise or the accountability, that they are unable accommodate their decisions to the obligation of protecting property rights under federal law. Nor is there any reason that they should be exempt from the obligation to protect such rights.

But there exists a more fundamental reason for the implementation of such a rule in this case. The present case simply does not necessitate a sweeping re-ordering of State and Federal relations. The issue in this case is narrow. It was posited in Justice Stewart's concurrence in *Hughes v. State of Washington* 389 U.S. 290, 296 (1967). Does a taking occur when a state court works "sudden change in state law, unpredictable in terms of the relevant precedents" which defeases an owner of property rights long recognized to be significant and important? *Hughes, supra*.

That is the issue.

There is no doubt under present Constitutional law that such an action – had it been taken by a legislature – would constitute a taking. *Webb's Fabulous Pharmacies, supra* at 164. There is no reason in this case why a judiciary should not be equally so bound.

IV. THE RECOGNITION OF A DOCTRINE OF JUDICIAL TAKINGS IS NECESSARY AND IMPORTANT TO THE PROTECTION OF RIGHTS GUARANTEED BY THE UNITED STATES CONSTITUTION.

As Justice Scalia noted in his dissent in *Stevens v. City of Cannon Beach,*[4] there is a real and significant difference between reasoned judicial decision making and result-oriented artifice. And to allow the latter in this case would "defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." *Hughes v. Washington, supra* at 296-297(1967)(J. Stewart, concurring). But the need to recognize a judicial takings doctrine transcends the matter under review. This case as well as the case of *City of Cannon Beach* as well as the case of *Hughes v. Washington* are simply reflective of a normal human tendency to see the "ends as justifying the means" when confronted with an issue of significant social concern. Many times the problems generated by this tendency are cured by the normal appellate process. For instance, in *Boe v. State, Department of Human Services*, 367 N.J. Super. 572, 844 A.2d 531 (N.J. Super. Ct. App. Div. 2004) a New Jersey appellate court abolished the centuries old rule that the survivor of a joint tenancy takes free of a predeceasing joint tenants debts. *Boe, supra* at 581. The purpose of that ruling was admittedly to allow the State to recover institutional liens for medical treatment. *Boe, supra*. At that time, however, there were probably thousands, if not tens of thousands, of parcels of property in the State of

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[4] 510 U.S. 1207 (1994) (Scalia, J., and O'Connor, J., dissenting from denial of the petition for writ of certiorari)

New Jersey owned by the survivors of what were once joint tenancies. The *Boe* decision would have retroactively created liens in favor of the state against titles to an untold number of properties. *Boe, v. State, Dept. of Human Services,* 2004 WL 5475146 (N.J. April 29, 2004) (Amicus Brief of New Jersey Land Title Association). The State Supreme Court granted certification to review that decision. *Boe v. State, Dept. of Human Services*, 182 N.J. 139, 861 A.2d 844 (2004). And even though the issue was mooted by a legislative enactment, the New Jersey Supreme Court vacated not only the judgment but even the *opinion* of the appellate court so that its dicta would not retroactively cloud titles as to liens other than the one dealt with by the curative legislation. *Boe v. State, Dept. of Human Services*, 183 N.J. 289, 873 A.2d 500 (N.J. 2005).

Results such as found in *Boe* are commendable but by no means guaranteed. As is the case with many of the nation's highest courts, in New Jersey appeals concerning violations of the United States Constitution are of right, R. 2:2-1(a)(1), but certification of non-constitutional claims is discretionary. R. 2:12-4. Discretionary certification is limited by court rule. R.2:12-4. It is not always granted. That fact can deny review of pretextual rulings depriving citizens of property rights, such as is presented herein. *See e.g.*, *M & D Associates v. Mandara*, 366 N.J. Super. 341, 354-355, 841 A.2d 441, 449-450 (N.J. Super. Ct. App. Div. 2004) (owners of property were divested of title by implementation of unwritten and previously unannounced rules of procedure obviously designed by the court hearing the matter to reach a desired result), cert. denied 180 N.J. 151, 849 A.2d 184 (N.J. 2004).

This is why the present matter is important. A rule of law recognizing judicial takings will do no more that implement the words of the United States Constitution which provides that no "State" – regardless of the identity of the State actor – shall deprive citizens of property without due process of law. *U.S. CONST. Amend. XIV.* But importantly, it will caution judges – as well as legislators – on those occasions when the human tendency to see the "ends as justifying means" threatens to overshadow the dictates of the Constitution.

CONCLUSION

The rejection of "form over substance" is neither profound nor esoteric. It is a commonplace of modern law. It is a rejection of pretext over actuality. And where Constitutional rights have been denied by through pretext, Justices of this Court have spoken out against it. Here, the pretext of judicial decision-making has denied protected Constitutional rights. This case presents this Court with an opportunity to assure that the substance of the Constitution's prohibitions against State takings is elevated over the form of pretextual rulings, which otherwise would deny rights guaranteed by the United States Constitution.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

STOP THE BEACH RENOURISHMENT, INC.,
Petitioner

v.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND, WALTON COUNTY, AND CITY OF DESTIN,
Respondents.

On Writ of Certiorari to the Florida Supreme Court

BRIEF *AMICUS CURIAE* OF OREGONIANS IN ACTION LEGAL CENTER IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Did the Florida Supreme Court Opinion constitute a judicial taking of Petitioner's property without just compensation contrary to the Fifth and Fourteenth Amendments of the United States Constitution and contrary to the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution?

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BRIEF *AMICUS CURIAE* OF OREGONIANS IN ACTION LEGAL CENTER IN SUPPORT OF PETITIONER

IDENTITY AND INTEREST OF *AMICUS CURIAE* [1]

Pursuant to Supreme Court Rule 37.3(a) Oregonians In Action Legal Center (OIA) respectfully submits this brief *amicus curiae* in support of the

[1] No counsel for any party authored this brief in whole or in part. *Amicus* does cite to the brief of Petitioner where appropriate to avoid repetition. No person or entity other than *Amicus Curiae* Oregonians In Action, its members or its counsel made any monetary contribution specifically for the preparation or submission of this brief.

Petitioner. Written consent has been granted by counsel for all parties and has been or will be lodged with the Clerk of this Court.

OIA is a non-partisan, non-profit public interest law center focused on litigation to protect the constitutional rights of landowners from excessive and increasingly burdensome federal, state and local regulations. OIA successfully represented the Petitioner in the United States Supreme Court case of *Dolan v. City of Tigard*, and has filed other Petitions for Certiorari and has appeared *amicus curiae* in many significant takings clause decisions in state and federal courts in the last two decades.

OIA believes its experience with takings jurisprudence arising in Oregon can be helpful to this Court in formulating its decision.

SUMMARY OF ARGUMENT

The Florida Supreme Court Opinion, with due respect, exhibits a decidedly result-oriented decision. It transformed an "as applied" case from the factually developed record into one of a facial attack on a statutory and administrative scheme that both transferred legal title to lands from Petitioner's members to the State of Florida and transformed their vested common law right to exclusive access to the dry sand beach into a non-exclusive right shared with all others who choose to use it. This transfer of title and destruction of the right to exclude others should be held to constitute a per se taking which demands payment of just compensation.

The illusory system for objecting to the erosion control line (which sets the claim of ownership of the State landward) fails to meet the procedural due

process demands of the Fourteenth and Fifth Amendments.

Even if the decision of the Florida Supreme Court did not constitute a per se taking of the Petitioner's property, the ad hoc analysis set forth by this Court in *Penn Central* and *Tahoe-Sierra* strongly suggests that a taking occurred.

OIA urges the Court to refine and limit the element of general application of any scheme (legislative, administrative, executive or judicial) that has significant adverse impacts on the established real property rights of owners in any takings analysis. OIA submits that the thumb of justice should be placed on the owner's side of the scales where, as here, the scheme is directed at a limited number of owners and transfers an existing real property right (exclusive possession, title and accretion) from those owners to the public.

The need for a clear and more strongly articulated rule is demonstrated by the prior Oregon experience where its court applied—inappropriately, in the opinion of OIA—the doctrine of custom to make available to the public privately owned beaches from one end of Oregon to the other. Florida has used a different system, but the goal appears to be identical.

ARGUMENT

I.

A. Transfer of title and destruction of the right to exclude others should be held to constitute a per se taking under the Fifth and Fourteenth Amendments.

The Florida scheme at issue actually passes legal title from Petitioner's members to the State of Florida.

See Brief of Petitioner at 10, *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., No.* 08-1151 (hereinafter Brief of Petitioner); Fla. Stat § 161.191(1), Vesting of Title to Lands.

In addition, the well-established common law right to exclusive possession of the dry sand area of the beach has been converted to a non-exclusive right to be shared with all others who choose to use that land. *See* Brief of Petitioner at 18 (". . . after the recording of the ECL and the beach nourishment, commercial vendors are allowed on the beach between the ECL and the new MHWL in front of [Petitioner's] homes."), and at 23, 27 and 34.

The clear transfer of legal title is the same result that would occur under the exercise of the power of eminent domain, but without the payment of just compensation that eminent domain requires.[2] The federal Declaration of Taking Act, 40 U.S.C. § 3114, irrevocably places title in the United States and makes it subject to payment of just compensation. Here, the Florida Supreme Court has sanctioned that transfer of title and short-circuited the ability to obtain compensation by method of redefining out of existence Petitioner's long-standing common law rights.

The destruction of the right of exclusive possession is equally troubling. *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309 (1994) is instructive. This Court in *Dolan*, citing *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 100 S. Ct. 383 (1979), made clear that compelling public access would deprive ". . . . . petitioner of the right to exclude others, 'one of the

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[2] The Act clearly contemplates some use of the power of eminent domain. Fla. Stat. § 161.141.

most essential sticks in the bundle of rights that are commonly characterized as property'." *Dolan*, 512 U.S. at 384. This Court went on to explain how regulatory cases differ decidedly from those where the government winds up with an actual interest in the property: " . . . the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the City." *Id.* at 385. The Court also noted that the City had failed to justify the transfer of title to suit its goal given that leaving the area in question in private ownership, but under regulation, should suffice. *Id.* at 393. The Florida scheme likewise fails.

The government's intrusion in this case goes even further than in *Dolan*. The government actually directed its contractors to go, without permission, onto some of Petitioner's members' uplands property. *See* Brief of Petitioner at 11, 12.

This Court in *Dolan* also gave notice that "we see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of the poor relation in these comparable circumstances." *Dolan*, 512 U.S. at 392. OIA urges the Court to build off that salutary proposition set forth in *Dolan* to strengthen the rights which belong to the Petitioner property owners.

OIA respectfully submits that no court giving the just compensation clause its rightful place alongside the Fourth Amendment should any more allow compelled sharing of an exclusive right to possession of a beach and its attendant privacy than it would compel one to share the exclusive right to possession in their yard for all to use, which would grant them

the attendant ability to peer inward. *See e.g. California v. Ciraolo*, 476 U.S. 207, 106 S. Ct. 1809 (1986) (approving looking downward from 1,000 feet above a fenced backyard as not in violation of the Fourth Amendment.). Here, in order for the homeowner to maintain his or her previously-protected privacy he/she would have to either build a fence or install blinds and keep them closed to keep the public from looking from the newly-created public beach into his/her home. If the homeowner did that he/she obviously would give up the valuable view right of a riparian owner.

ARGUMENT

II.

A. The illusory system for objections to the erosion control line fails to meet procedural due process demands.

Petitioner's Brief at 59-66 sets forth the procedures that fail to provide any pre-deprivation meaningful hearing and yet allows for the transfer of legal title by approving and recording the erosion control line survey.

Fla. Stat.§ 161.161(3) ("Procedure for Approval of Projects") allows that "in lieu of conducting a survey, the board of trustees may accept and approve a survey as initiated, conducted and submitted by appropriate local government if said survey is made in conformity with the appropriate principle set forth in ss. 161.141-161.211."

The standard in Fla. Stat. § 161.161(5) that the board of trustees "shall be guided by the existing line of mean high water, bearing in mind that the requirements of proper engineering in the beach restoration project, the extent to which erosion or

avulsion has occurred, and the need to protect existing ownership of as much upland as is reasonably possible" is excessively broad and general and raises very serious questions as to how the Board must, if at all, consider the information obtained at the public hearing required by Fla. Stat. § 161.161(4).

Establishment of the Erosion Control Line ("ECL") modifies what was a dynamic boundary subject to accretion and reliction into one that is fixed. It is very difficult to remove that line. *See* Fla. Stat. § 161.211, Cancellation of Resolution for Non-Performance of Board of Trustees. This provision provides little protection in the way of timely removal of the ECL. Under subsection (1), if the project is approved and survey recorded, but the project is not commenced, the line can remain a full two years from the date of the recording. If the construction was commenced but halted for a period exceeding six months, a written petition signed by owners or lessees of the majority of the lineal feet of riparian property would be required to get relief.

Under subsection (3), the board of trustees "may"—but appears not to be required to—direct the agency charged with responsibility of maintaining the beach to restore it to the extent provided in the board of trustees' recorded survey, but only when the shoreline encompassed within the erosion control project has receded landward of the erosion control line. It is possible for removal of the ECL to be mandated, but that requires the majority of owners or lessees of the lineal feet of riparian property within the erosion control project to submit a written petition to that effect. Even then the agency charged with maintenance is given a period of one full year from the directive from the Board to restore the beach as directed

before the ECL is to be cancelled and vacated of record. The Florida procedures indeed contemplate a very difficult process to get around the legal implications of the recording of the erosion control line.

Given the impact of the recordation (transfer of title, among others) and the methodology, the fact that the Board is not required to consider the information it obtains, and the importance of the recording of the erosion control line, due process rightly demands a meaningful hearing. This Court in *Londoner v. City and County of Denver*, 210 U.S. 373, 28 S. Ct. 708 (1908), negated a scheme that allowed for submission in writing of all objections and complaints of a tax assessment and set aside an assessment for a local improvement district. It held:

> "If it is enough that, under set circumstances, an opportunity is given to submit in writing all objections to and complaints of a tax to the board, then there was a hearing afforded in the case at bar. But we think that something more than that, even in proceedings for taxation, is required by due process of law. Many requirements essential in a strictly judicial proceeding may be dispensed with in proceedings of this nature. But even here a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and if need by, by proof, however informal. It is apparent that such a hearing was denied to the plaintiffs in error."

Id. at 386 (internal citations omitted).

The context of *Londoner* was a tax assessment for a local improvement district. Here an actual transfer

of title and destruction of exclusive possession has occurred. *Londoner* does not require much, but the Florida system fails even under its standard. Unquestionably, the Florida system does not meet the modern authorities set forth by Petitioner.

ARGUMENT

III.

A. Even if there is not a per se taking of petitioner's property the ad hoc balancing required by this court strongly suggest that a taking has occurred.

Respondents have previously argued for a regulatory taking analysis. *See* Petitioner's Brief at p. 58, n. 37. OIA submits there is no need for this type of analysis. However, giving due weight to various elements identified in this Court's takings jurisprudence, the ad hoc analysis would also require a conclusion of a taking.

The opinion of the Florida Supreme Court quoted from the Declaration of Public Policy contained in Fla. Stat. § 161.088, which states that "beach erosion is a serious menace to the economy and general welfare of the people of the state and has advanced to emergency proportions . . . " *Walton County v. Stop the Beach Renourishment, Inc.*, 998 S.2d 1102, 1107 (Fla. 2008). However, the Act expressly provides for shore erosion emergencies at Fla. Stat. § 161.111, which was not at issue.[3]

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[3] The Florida Supreme Court clearly limited its consideration to specific sections of the Act which did not include the shore erosion emergency provision. *Walton County* 998 S.2d at 1103 n.2.

The Florida court's opinion also notes that the Department of Environmental Protection has been delegated the duty to determine "those beaches which are critically eroded and in need of restoration and nourishment". *Id.* at 1107-08. In turn, the Florida Administrative Code defined "critically eroded shoreline" as:

> "A segment of shoreline where natural processes or human activities have caused or contributed to erosion and recession of the beach and dune system to such a degree that Upland Development, recreational interests, wildlife habitat or important cultural resources are threatened or lost. Critically eroded shoreline may also include adjacent segments or gaps between identified critical erosion areas which although they may be stable or slightly erosional now, their inclusion is necessary for continuity of management of the coastal system or the design integrity of adjacent beach management projects.

Walton County, 998 S.2d at 1108 (quoting Fla. Admin. Code R.62B-36.002(4) (emphasis added)).

Petitioner's members' homes sit on an accreting beach more than 200 feet of dry sand and dunes away from the mean high water line. Upon completion of the beach nourishment there was a newly created 75 foot wide public beach seaward of the MHWL. *See* Petitioner's Brief at 6.

Taking the refined governmental interest from Florida Administrative Code, R.62B-26.002(4) as a starting point for analysis, we see that it allows transfers of private legal interests to the state under circumstances where it is possible that only natural processes contributed to erosion and recession of the

beach and dune system to such a degree that upland development, recreational interests, wildlife habitat or important cultural resources are threatened or lost. OIA again points out that there is no claim here of any emergency or risk to life that is imminent. Instead, the interests asserted are only threatened.

The administrative rule continues to allow inclusion of "adjacent segments" or gaps between identified critical erosion areas which may be stable or slightly erosional now if their inclusion is necessary for continuity of management of the coastal system or for the design integrity of adjacent beach management projects.

Thus, it appears to be the case that petitioner's members whose homes sit on stable, accreting beaches could be included under the claim that such inclusion is necessary for continuity of management of the coastal system or with the design integrity of adjacent beach management projects.

The deprivation to the owners is well briefed by Petitioner at 51-58. OIA only underscores the self evident statement made in Petitioner's Brief at 55 n.34, that "a land being riparian 'is often the most valuable feature' of the property." *Hughes v. Washington*, 389 U.S. 209, 293, 88 S. Ct. 438 (1967); *Accord, Thiesen v. Gulf, F. & A.R. Co.*, 75 Fla. 28, 78, 78 So. 491 (1917) (finding that "the fronting of a lot upon a navigable stream or bay often constitutes this chief value and desirability"; further, "riparian rights incident to the ownership of the land or the principal, if not sole, inducement leading to its purchase . . . ").

Although not stated in monetary terms the extreme value of these rights should be an adequate

marker and substitute for substantial monetary value.

The Florida Supreme Court separately described the purpose of the Act as promoting "the public's economic, ecological, recreational and aesthetic interest in the shoreline. *See Walton County*, 998 S.2d at 1115. It is noteworthy that these "public" interests are expanded at the expense of private property owners. The Florida Supreme Court gives no weight to the transfer of title away from the owners and the conversion of an exclusive right to use the beach to one of shared use with the public. Instead, it claims that there is no material or substantial impairment of those littoral rights under the Act. This assertion seems to fly directly in the face of both *Dolan* and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164 (1982).

The Florida Court also appears to rely on its assertion of a state constitutional duty to protect Florida's beaches and a claim of benefit to private owners based on the Act. However, its final conclusion is only that the Act facially achieves a reasonable balance between public and private interest in the shore. *Walton County*, 998 S.2d at 1120. The claimed benefit from maintenance is illusory at best. The Act expressly contemplates there will be circumstances where maintenance will fail. Fla. Stat. § 161.211(2).

The Florida Court did not perform an analysis using appropriate federal jurisprudence standards. We start with those. We choose this court's opinion in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, et al.*, 535 U.S. 302, 122 S. Ct. 1465 (2002), because it analyzes and compares per se rules with those required for the ad hoc

balancing required under *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646 (1978), which requires ad hoc factual inquiries designed to allow the careful examination and weighing of all relevant circumstances.[4]

The Florida Supreme Court did not cite or discuss any of the federal regulatory takings analysis cases. If allowed to stand, the great vice in what it has done could wipe out any owner's existing or even future claims of a taking under federal jurisprudence pursuant to the *Penn Central* doctrine of reasonable investment backed expectations. *See Penn Central*, 438 U.S. 104 (1978). How could any Florida landowner claim a reasonable, investment-backed expectation when faced with the highest court in the state rewriting property law in this sudden, about-face manner? It could happen again and again and again. The Florida Supreme Court has laid the groundwork for other courts to simply tell owners that they are charged with knowledge of such unpredictable changes and therefore cannot rely on the status of century-old law.

OIA respectfully submits that the Florida scheme transfers critically important and valuable rights to the public under circumstances where no contributing acts of the owners have in any way caused the

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[4] OIA reluctantly makes this argument because it seems so clear that there has been a physical taking. The Court in *Tahoe-Sierra Preservation Council*, 535 U.S. at 325 n.18, quoted from *Loretto*, 458 U.S. at 440, when discussing the distinction between physical and nonphysical takings: "So long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity."

claimed problem. The impact falls on a small group of individuals who happen to own beachfront property.

OIA urges this Court to incorporate into its opinion a clear requirement weighing heavily in favor of landowners where it appears that the government is attempting to extract some right from them and transfer it to the public. The more important and valuable the right in question the more weight should be given to the landowner in the mix. In the instant case, these rights include both the littoral right of accretion and the exclusive use of the dry sands beach area added by the accretion and the title to the area. These are all critically important and valuable rights.

B. The Florida scheme lacks the safeguard of proper generality of application and should merit special judicial attention.

The Florida scheme could be read to apply to all beachfront owners both on the Gulf and Atlantic coasts of Florida, but further review of the statutory and administrative implementation show that its reach is much more restricted. Fla. Stat. § 161.161(6) prohibits beach restoration or beach nourishment projects where any local share is required without first obtaining the approval of the local government or governments responsible for that local share. This project, although it covers a 6.9 mile stretch of beach (*see* Petitioner's Brief at 8), affects a relatively small number of petitioner's members whose homes sit on an accreting beach more than 200 feet of dry sand and dunes away from the mean high water line. *See* Petitioner's Brief at 6. Following the beach nourishment there was an additional 75 foot wide public

beach seaward of the mean high water line. *See* Petitioner's Brief at 6.

In his dissent in *Lucas v. South Carolina Coastal Counsel*, 505 U.S. 1003, 1071 112 S. Ct. 2886 (1992), Justice Stevens noted:

> "The Just Compensation Clause 'was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' . . . . We have, therefore, in our takings law frequently looked to the generality of a regulation of property." (internal citations omitted).

Justice Stevens continued:

> ". . . similarly, in distinguishing between the Kohler Act (at issue in Mahon) and the Subsidence Act (at issue in Keystone), we found significant that the regulatory function of the latter was substantially broader. Unlike the Kohler Act, which simply transferred back to the surface owners certain rights that they had earlier sold to the coal companies, the Subsidence Act affected all surface owners—including the coal companies—equally."[5]

Id. at 1072-73.

Applying Justice Stevens' comparison of the Kohler Act with the Subsidence Act and his admonition for generality, the Florida system comes up short. The Florida system applies under the broadest possible reading to only those persons who have lands adjacent to the Gulf and Atlantic coasts. This narrow

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[5] Generalized application can only take any analysis so far since ultimately if there is a constitutional violation of a citizen's rights, those rights must be preserved.

band of private owners who held exclusive rights in and title to the dry sand areas are subject to the well-organized and focused efforts of those who desire to have access to those beaches and at the same time are unwilling to pay the owners for that right.

The focus of the Florida scheme on only those owners who have property rights that the state wants for public use and access demonstrates the problem. It is highly doubtful that Florida would pass a legislative scheme imposing public easements in front, back and along the sides of all residential properties throughout the state for ease of its citizens to walk or bike to their destinations. It is that type of broad based generality, and only that type, that is protective of individual rights.

OIA urges this Court to clarify and limit use of the element of generality in analysis of takings cases. OIA submits that where it appears that government action takes an established real property right from one group and provides it to another by virtue of any type of legislative, administrative, executive, or judicial scheme, the element of generality of application should not be applied in takings analysis.

ARGUMENT

IV.

A. There is a need for a strongly articulated and clear federal rule.

The Oregon experience, like Florida's, is an example of judicial creativity to reach a desired result. The Oregon experience starts with *State ex rel. Thornton v. Hay*, 254 Or. 584, 462 P.2d 584 (1969), which rejected the basis upon which the case was originally tried and creatively applied the "custom" of

using the dry sands area of the beach from one end of the state to the other. Next was *Hay v. Bruno*, 344 F. Supp. 286 (D. Or. 1972), wherein a three judge panel upheld the decision in *Thornton* and subsequent legislation. Justice Stewart's analysis from *Hughes v. Washington*, 389 U.S. 290, 88 S. Ct. 438 (1967), which would prohibit sudden changes in state law unpredictable in terms of their relevant precedents, was held not applicable. *Id.* at 289. Next was *McDonald v. Halvorson*, 308 Or. 340, 780 P.2d 714 (1989). It cast significant doubt on the *Thornton* enunciation of custom applying to beachfront property from one end of the state to the other. Finally, *Stevens v. City of Cannon Beach*, 317 Or. 131, 854 P.2d 449 (1993), again sustained the doctrine of custom to allow public use of all dry sand areas. It cited *McDonald v. Halvorson* and may have left open the application of the doctrine of custom for access and use to even inland areas if the factual predicates for application of the doctrine were present.[6]

It's not clear to OIA the exact cause for such creativity except that our society has been able to create various groups with the focus and goal of organizing and funding lobbying and litigation. Perhaps the increased efforts of various interest groups and the fact that most state judges are elected are contributing causes. Whatever the cause, and with due respect, indeed great respect, for our courts it seems clear that there will always be efforts on the part of some group that claims to speak for a lofty public interest, but that has the goal of taking a property interest from those who own it and having it transferred to the public so all may take advantage of

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[6] *See Stevens*, 317 Or. at 138.

it. These efforts seem quite pronounced when dealing with the coastlines of our country and along its rivers and streams. The Oregon experience is quite demonstrative with respect to both the coast and a stream—*Thornton* and *Stevens* with respect to the coast, and *Dolan* with respect to a creek.

Oregon's efforts at opening dry sand beach areas from one end of the state to the other, and the serious questions it raised under the takings clause are noted by Justice Scalia in his dissent (joined by Justice O'Connor) in *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 114 S. Ct. 1332 (1994), where this Court denied Stevens' petition for writ of Certiorari. There is a suggestion by Justice Scalia that had there been a factual record the Court may have taken review of the case. *Id.* at 1335. *Amicus* points out in the instant case that there is a well-documented record in Petitioner's Brief.

Amicus adds a few points to those made by Justice Scalia in his dissent.

The first point is that the Oregon Supreme Court dismissed this Court's holding that the boundary marking upland ownership is the mean high tide line. *Borax Consol., Ltd. v. Los Angeles*, 296 U.S. 10, 22-27, 56 S. Ct. 23 (1935). After acknowledging that holding, the Oregon court then dismissed it with this statement:

> "This court has noted that although Borax 'may have expanded seaward the record ownership of upland landowners, it was apparently little noticed by Oregonians . . . [and] had no discernible effect on the actual practices of Oregon beachgoers and upland property owners.'"

Stevens, 317 Or. at 141 n.12.

The *Stevens* court was quoting from the earlier *Thornton* opinion, 254 Or. at 590. It thus seems that the Oregon court is quite willing to give sanction to ignoring controlling law if there is evidence of widespread violation of it.

However, it is clear that the *Borax* rule was not totally ignored. In 1978 the Ninth Circuit in dealing with the same rule that set the limit of the Corps of Engineers power under the navigational servitude and the Rivers and Harbors Act of 1899 rejected the Corps' efforts to extend jurisdiction above the mean high water line. *See Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir 1978). The Ninth Circuit noted that this Court's opinion in *Willink v. United States*, 240 U.S. 572, 36 S. Ct. 422 (1916), held that federal regulatory jurisdiction over navigable tidal waters extended to the mean high water line. *Id.* at 748. That power which defines the navigation servitude allowed removal of obstructions to navigability without compensation. The Ninth Circuit concluded:

> "Accordingly, an expansion of 'navigable water' shoreward diminishes the protection of the Fifth Amendment. We think an interpretation of the Act which accomplishes this, first advanced seventy-two years after its enactment, should be viewed with skepticism to say the least."

Id.

The Ninth Circuit also noted that *Borax* had used the same mean high water line to delineate boundaries between upland owners. It stated:

> "The navigational servitude reaches to the shoreward limit of navigable waters. To extend the servitude on the basis of a recently formulated administrative policy is to impose an addi-

> tional burden of unknown magnitude on all private property that abuts on the Pacific coast."[7]

Id. at 752.

The *Stevens* court also cited and relied on the federal district court opinion in *Hay v. Bruno.*, 344 F. Supp. 286, but the *Bruno* court in 1972 did not have the benefit of the Oregon Supreme Court's vacillation and questioning of application of the law of custom set forth in *McDonald v. Halvorson* in 1989.

Amicus also calls to the Court's attention that it was not just the two dissenting justices who dissented on the denial of Certiorari but also a contemporaneous law review article that pointed out the deficiencies in the earlier *Thornton* opinion. *See* Lew E. Delo, *The English Doctrine of Custom in Oregon Property Law: State Ex rel. Thornton v. Hay*, 4 ENVTL. L. 383 (1974).

Whatever the flaws the Oregon trilogy of cases *Thornton*, *Halverson* and *Stevens* display, there was at least one judicial review (albeit without the benefit of the Halverson opinion casting some question on the reach of the "custom") of whether the *Thornton v. Hay* opinion constituted a sudden change in state law unpredictable in terms of the relevant precedents. Although rejecting that argument, the opinion also lays out the curious history of a trial judge using one

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[7] The *Leslie Salt* opinion also sets forth explanations of morning and afternoon tides known as 'diurnal in equality' and notes the differences between the mean high high water and mean high water line as being greater on the Pacific coast than either the Gulf or Atlantic coast, together with an explanation of the differences in the tidal cycles in the Gulf coast the Pacific and Atlantic coast. *See Leslie Salt*, 578 F.2d at 746 and 752 n.11.

theory and having the Oregon Supreme Court transform it to make it applicable from the top to bottom of the state along the Pacific coast. *See Hay v. Bruno*, 344 F. Supp. 286.

Thus, for all its flaws the Oregon experience at least had a concentrated and focused judicial review of the issue of sudden change in state law unpredictable in terms of relevant precedents. *Amicus* suggests that the authorities and logic contained in the dissent in the Florida Supreme Court case supports a different outcome here.

CONCLUSION

Amicus OIA respectfully submits that the Florida Supreme Court should be reversed and urges this Court to incorporate into its decision a clarification and strengthening of the points that *Amicus* has submitted.

Dated this 19th day of August, 2009.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 08-1151

In The
Supreme Court of the United States

STOP THE BEACH RENOURISHMENT, INC.,

Petitioner,

v.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND, WALTON COUNTY, and CITY OF DESTIN,

Respondents.

On Writ Of Certiorari To The Florida Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER AND BRIEF AMICUS CURIAE OF OWNERS' COUNSEL OF AMERICA IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

Pursuant to this Court's Rule 37, Owners' Counsel of America requests leave of the Court to file this brief amicus curiae in support of Petitioner.

Amicus requests leave to file this brief outside the time established in Rule 37.3(a) because undersigned counsel of record who was principally responsible for producing this brief experienced both the death of an immediate family member and concurrently contracted a severe case of adult chicken pox which resulted in hospitalization. Counsel of record for both Petitioner and Respondents were notified of the above circumstances and informed amicus they have no objection to the filing of this brief.

September 2009.

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QUESTIONS PRESENTED

The Florida Supreme Court invoked "nonexistent rules of state substantive law" to reverse 100 years of uniform holdings that littoral rights are constitutionally protected. In doing so, did the Florida Court's decision cause a "judicial taking" proscribed by the Fifth and Fourteenth Amendments to the United States Constitution?

Is the Florida Supreme Court's approval of a legislative scheme that eliminates constitutional littoral rights and replaces them with statutory rights a violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution?

Is the Florida Supreme Court's approval of a legislative scheme that allows an executive agency to unilaterally modify a private landowner's property boundary without a judicial hearing or the payment of just compensation a violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution?

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INTEREST OF AMICUS CURIAE

The Owners' Counsel of America (OCA) is a non-profit organization, organized under IRC § 501(c)(6) and sustained solely by its members.[1] OCA is a voluntary network of the most experienced eminent domain and property rights attorneys from across the country who seek to advance, preserve and defend the rights of private property owners, large and small, locally and nationally. Since its founding in 2000, OCA has sought to use its members' combined knowledge and experience as a resource in the defense of private property ownership, and to make that opportunity available and effective to property owners nationwide. OCA member attorneys have been and are involved in landmark property rights cases in nearly every jurisdiction nationwide.

SUMMARY OF ARGUMENT

This case concerns whether the "background principles" exception to *per se* takings in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), permits state courts to construe local property law in a manner that threatens to virtually swallow up all

[1] All counsel of record consented to the filing of this brief, and received notice of the intention to file this brief at least ten days before it was due. This brief was not authored in any part by counsel for either party, and no person or entity other than amicus and counsel made a monetary contribution toward the preparation or submission of this brief.

regulatory takings.[2] Indeed, state courts have been actively encouraged to leverage their power to define background principles to avoid takings. *See* Huffman, *Background Principles*, 35 ECOLOGY L.Q. at 1 ("Fifteen years later, some who saw only dark clouds on the regulatory horizon as a consequence of *Lucas* now see a rainbow with a pot of gold at its end."); John D. Echeverria & Sharon Dennis, *The Takings Issue and the Due Process Clause: A Way Out of a Doctrinal Confusion*, 17 VT. L. REV. 695, 705 (1993) (nuisance law may consume the *per se* takings rule).

This brief addresses three issues. First, the notion of "property" embodies core components transcending a state court's power to redefine. The rule of accretion, which insures that littoral parcels remain so, is one of those fundamental components. Second, the remedy for a judicial taking is invalidation of the state court judgment. Third, this brief summarizes several of the more notable instances where state courts have openly and notoriously rewritten established rules of property. This was accomplished under the guise of "correcting"

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[2] Professor James L. Huffman has suggested "background principles" includes public trust, natural use, navigational servitude, customary rights (including native gathering rights), various doctrines of water rights law, wildlife trust, Indian treaty rights, preexisting state and federal statutes and constitutions, destruction by necessity, criminal forfeitures, and revocable grants to public resources. James L. Huffman, *Background Principles and the Rule of Law: Fifteen Years After* Lucas, 35 ECOLOGY L.Q. 1, 9 (2008).

errors in long-standing common law doctrines, reinterpreting terms to alter their commonly understood meanings, or "discovering" that private property is (and has been all along) subject to a public trust.

ARGUMENT

I. PROPERTY EMBODIES A CORE NORMATIVE COMPONENT WHICH MAY NOT BE ALTERED BY STATE COURTS WITHOUT COMPENSATION

While the Fifth and Fourteenth Amendments expressly protect property, the contours of what constitutes property is left mostly to definition by state legislatures and courts. *See, e.g., Damon v. Hawaii*, 194 U.S. 154, 157 (1904); *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979); *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 161 (1980); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992). A state's authority is not exclusive, however, and it is well-accepted that the Takings and Due Process Clauses constrain a state's legislative and executive powers and prohibit those branches from rewriting the accepted rules of property and declaring that what has always been private is now public. *See, e.g., Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (the state may not, "by *ipse dixit* . . . transform private property into public property without compensation"); *Lucas*, 505 U.S. at 1014 ("the

government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits"); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (agency improperly required landowner to dedicate public easement as a condition of development approvals). Were the actions of the Florida Supreme Court in this case attributable instead to the Florida Legislature or the executive branch, there is little doubt that a taking would be found.[3]

The authority of state courts is similarly constrained, as state courts are bound to honor federal constitutional limitations. U.S. CONST. ART. IV ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . "). The Fourteenth Amendment's Due Process clause

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[3] For a recent example of a state using its legislative power to attempt to *ipse dixit* rewrite established common law rules of accretion, *see* Hawaii's Act 73. In Act 73, the state legislature sought to overthrow the ancient reciprocal system of littoral accretion and erosion, instead decreeing that the state acquires private lands lost to erosion, but also owns accreted lands. Under the Act, no one but the state is able to register or quiet title to accreted land unless a littoral owner overcomes a virtually insurmountable standard of proof. When challenged, a Hawaii trial court invalidated Act 73 as a taking. *See* Order Granting Plaintiffs' Amended Motion for Partial Summary Judgment filed February 13, 2006 (May 3, 2006), *Maunalua Bay Beach Ohana 28 v. State of Hawaii*, Civ. No. 05-1-0904-05 (Sep. 1, 2006) (available at http://www.inversecondemnation.com/accretion_order_mpsj.pdf). The state has appealed the judgment to the Hawaii Intermediate Court of Appeals.

incorporates the guarantees of the Fifth Amendment against the *states*, not merely state legislatures and state executive branches. U.S. CONST. AMEND. XIV ("nor shall any State deprive any person of life, liberty, or property, without due process of law"). In *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897), the case incorporating the Takings Clause against the states, this Court held:

> But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the State, to its legislative, executive and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the State, "violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State." This must be so, or, as we have often said, the constitutional prohibition has no meaning, and "the State has clothed one of its agents with power to annul or evade it."

Id. at 234-35 (quoting Ex parte *Virginia*, 100 U.S. 339, 346-47 (1880)). In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Court recognized that state courts have wide latitude to define property, but that ability is subject to constitutional limitations:

> It is, of course, well established that a State, in the exercise of its police power, may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision.

Id. at 81 (citing *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976)).

The case at bar presents the Court the opportunity to provide definitive guidance that "property" is not a completely malleable term, but rather embodies a core set of normative principles immunized by the Fifth and Fourteenth Amendments from state court redefinition without compensation, especially where, as here, the result of state action is a *per se* taking of property.[4]

> If it were to be accepted that the . . . holding in *Lucas* can fairly be understood to embrace

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[4] Florida's deprivation of Petitioner's members' rights to have their parcels maintain contact with the ocean is a *per se* taking of property because the Florida Supreme Court's new rule did not simply destroy the right, it transferred it to the public. *See Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003) (state's reassignment of interest is a *per se* taking); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (government's invitation for the public to enter private marina was a *per se* physical taking); *United States v. Causby*, 328 U.S. 256 (1946) (government had not merely destroyed easement, but was using it for its own purposes).

> the notion that the common law is almost infinitely malleable at the discretion of any court or legislature, then the ambitions of those who would read the takings clause out of the constitution are finally and fully realized. But the common law cannot be so pliable at the hands of adjudicators and lawmakers or it no longer serves its core purpose: the rule of law. To be sure, legislators have power to alter or repeal the common law through legislation, but they do not, consistent with the rule of law, have power to declare the common law something it is not.

Huffman, *Background Principles*, 35 ECOLOGY L.Q. at 12.

This Court has addressed the issue before, although never directly. *See, e.g., PruneYard Shopping Center v. Robins*, 447 U.S. 74, 93 (1980) (Marshall, J., concurring) ("I do not understand the Court to suggest that rights of property are to be defined solely by state law, or that there is no federal constitutional barrier to the abrogation of common law rights by Congress or a state government. The constitutional terms 'life, liberty, and property' do not derive their meaning solely from the provisions of positive law. They have a normative dimension as well, establishing a sphere of private autonomy which government is bound to respect."); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (the state may not, "by *ipse dixit* . . . transform private property into public property without

compensation"); *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring) (government cannot wipe out property rights simply by legislating the property out of existence); *Broad River Power Co. v. South Carolina*, 281 U.S. 537, 540-41 (1930) ("[I]t is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus evaded."); *Muhlker v. New York & Harlem Railroad Co.*, 197 U.S. 544, 570 (1905) (state judicial power does not extend to take away rights acquired by contract). *See also Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001) (government cannot wipe out property rights by prospective legislation).

Common law rules of accretion and erosion – in Florida and elsewhere – are exactly the type of long-standing understandings which the Takings and Due Process Clauses were designed to protect from transfer to the public by a state court or legislature. *See, e.g., Kaiser Aetna*, 444 U.S. at 179-80 ("we hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation") (footnote omitted); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (interest on interpleaded funds); *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 172 (1998) (interest on lawyer's trust accounts is "private property"); *Hodel v. Irving*, 481 U.S. 704, 716

(1987) (passing property by inheritance a fundamental attribute of property); *Babbitt v. Youpee*, 519 U.S. 234, 239 (1997) (the statute in *Hodel* was struck down because "[s]uch a complete abrogation of the rights of descent and devise could not be upheld."). In *PruneYard*, Justice Thurgood Marshall concurred in the Court's holding that no judicial taking had occurred, but acknowledged:

> Quite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way. Indeed, our cases demonstrate that there are limits on governmental authority to abolish "core" common-law rights, including rights against trespass, at least without a compelling showing of necessity or a provision for a reasonable alternative remedy.

PruneYard, 447 U.S. at 93-94 (Marshall, J., concurring). Justice Marshall noted that in *Ingraham v. Wright*, 430 U.S. 651 (1977), the Court determined the Due Process Clause prohibits abolishment of "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Id.* at 672-73, *quoted in PruneYard*, 447 U.S. at 94 n.3 (Marshall, J., concurring).

The nearly universal rules of accretion and erosion have for centuries insured that riparian and littoral properties remain so, even when the water's edge shifts naturally over time. In the decision under review, however, the Florida Supreme Court radically

altered that ancient balance. To avoid ruling that a Florida statute abrogated rights which had been an established part of Florida law for more than a century, the court decreed those rights never really existed at all. With the stroke of a pen, the court eliminated the dominant feature of littoral and riparian property – continuous contact with the water, wherever the water naturally flows.[5] The ability to maintain a littoral parcel's physical contact with the ocean is not simply a unilateral expectation or a product of positive law, but an expectation "that has the law behind it." *Kaiser Aetna*, 444 U.S. at 178. Thus, it is property expressly protected by the Fifth and Fourteenth Amendments from arbitrary or capricious state action which includes a state court summarily altering established common law rules on which property owners have relied for over a century.

The Fifth and Fourteenth Amendments do not dictate what state law is, *see Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring) ("The Takings Clause does not require a static body of state property law."), but they do constrain all state action. If state courts are not limited from transferring established and universal common law property rights to the public

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[5] "Accreted" lands or "accretion" refers to land "gradually deposited by the ocean on adjoining upland property." *Hughes v. Washington*, 389 U.S. 290, 291 (1967). The accretion doctrine insures that riparian and littoral property owners maintain their parcel's access to water, which is often the most valuable feature of their property. *Id.* at 293.

under the guise of rediscovering the "true" law, then property will be "relegated to the status of a poor relation" to other rights protected by the Bill of Rights.[6]

II. REMEDIES FOR A JUDICIAL TAKING

The Takings Clause is self-executing and not merely a waiver of sovereign immunity. Nor is it a license for any branch of state government to run roughshod over established property rights provided the state is subject to an after-the-fact inverse condemnation lawsuit. The Takings Clause is a positive command as well as remedial: a state may not take private property without first condemning it and paying just compensation, and if a state has not provided compensation, its action may be invalidated or enjoined. In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), a plurality of this Court rejected the argument that a post-deprivation compensation remedy was the only available claim to a property

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[6] As this Court recognized in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), "We see no reasons why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances." *Id.* at 392 (citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); *Air Pollution Variance Bd. of Colorado v. W. Alfalfa Corp.*, 416 U.S. 861 (1974); *New York v. Burger*, 482 U.S. 691 (1987); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980)).

owner who asserted that a statutory scheme violated the Takings Clause:

> Based on the nature of the taking alleged in this case, we conclude that the declaratory judgment and injunction sought by petitioner constitute an appropriate remedy under the circumstances, and that it is within the district courts' power to award such equitable relief.

Id. at 522. *See also Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (the Takings Clause "stands as a shield against the arbitrary use of governmental power"); *Babbitt v. Youpee*, 519 U.S. 234 (1997) (affirming district court's invalidation of statute for violation of the Takings Clause because statute "made no provision for the payment of compensation").

Consequently, the only constitutional way for Florida to acquire Petitioner's members' property interests is to condemn and pay for them, which the state admittedly has not done. While increasing public ownership of beaches may be a public good, "[a] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). In that case, the seminal takings decision, this Court held there was a constitutional violation despite the fact the property owners whose interests were impaired by the statute could have sued for inverse condemnation. The Court

did not order the government to pay for the private property interests taken. Rather, the Court concluded "the act cannot be sustained as an exercise of the police power" and invalidated it. *Id.* at 414. *See also Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) ("Thus, if the Government wishes to make what was formerly Kuapa Pond into a public aquatic park after petitioners have proceeded as far as they have here, it may not, without invoking its eminent domain power and paying just compensation, require them to allow free access to the dredged pond[.]"); *Babbitt v. Youpee*, 519 U.S. 234, 239 (1997) (affirming district court's invalidation of statute for violation of the Takings Clause because statute "made no provision for the payment of compensation"); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (court invalidated government action for violating the Takings Clause); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (invalidation for violation of Takings Clause). Similarly, the Florida Supreme Court's action in the case at bar cannot be sustained as a valid exercise of the state's judicial power.

The procedural posture of *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) provides one example of how this remedy for a judicial taking could be implemented. In that case, the California Supreme Court interpreted the free speech provision in the California Constitution to provide greater rights than under the First Amendment, and reinterpreted California law to allow "speech and petitioning, reasonably exercised, in shopping centers

even when the centers are privately owned." *Robins v. Pruneyard Shopping Center*, 592 P.2d 341, 347 (Cal. 1979). The California Supreme Court expressly overruled its decision in an earlier case which held to the contrary. *PruneYard*, 447 U.S. at 78. The shopping center owner appealed to this Court, asserting the California Supreme Court's decision was a taking of the right to exclude others – "which is a fundamental component of their federally protected property rights" – by "judicial reconstruction of [California's] laws of private property." *Id.* at 79.

The Court concluded that no taking occurred because the shopping center "failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a 'taking.'" *PruneYard*, 447 U.S. at 84. The property owner "explicitly presented their federal constitutional right to prohibit public expression on their property[.]" *Id.* at 85 n.9. The Court further noted "this Court has held federal claims to have been adequately presented even though not raised in lower state courts when the highest state court renders an unexpected interpretation of state law or reverses its prior interpretation." *Id.* (citing *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-78 (1930); *Missouri* ex rel. *Missouri Ins. Co. v. Gehner*, 281 U.S. 313, 320 (1930); *Saunders v. Shaw*, 244 U.S. 317, 320 (1917)). Had the Court found the shopping center's right to exclude was essential to its use of its property, the judgment of the California Supreme

Court would have been vacated, and the case remanded, the relief Petitioner seeks here.[7]

III. JUDICIAL TAKINGS

Perhaps more so than state legislatures, state courts may be susceptible to reordering established property norms via abrogation of common law rules, "discovery" of background principles or custom never before enunciated, or expansion of the public trust doctrine from use of tidelands and navigable waters to encompass all natural resources that should be – in a court's judgment – in public ownership. This section details several of the more storied instances where state courts have accomplished precisely that.

A. Summarily Discarding Long-Established Common Law Rules

Robinson v. Ariyoshi, the case in which the Ninth Circuit invalidated a Hawaii Supreme Court decision

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[7] This procedure would not be subject to ripeness issues under *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), and would not require federal district courts to exercise appellate jurisdiction over state supreme courts. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005) ("The *Rooker-Feldman* doctrine, we hold today, is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.").

on judicial takings grounds, started out in 1959 in a Kauai county trial court as a dispute among several sugar plantations over which of them possessed the rights to surplus water in a Kauai stream, among other things. 753 F.2d 1468 (9th Cir. 1985). The parties based their claims on long-standing water law and prescriptive rights precedent of the Kingdom, Territory, and State of Hawaii. Nine years later, the trial court issued a 65-page decision based on that precedent, and declared who was entitled to what. At that stage, the case was just another in a long line of water disputes between private parties. The losing parties appealed to the Hawaii Supreme Court, where no party – including the State – argued the controlling water law was anything but as established by long-standing Hawaii precedent.

The Hawaii Supreme Court, however, "*sua sponte* overruled all territorial cases to the contrary and adopted the English common law doctrine of riparian rights." *Robinson*, 753 F.2d at 1470 (citing *McBryde Sugar Co. v. Robinson*, 504 P.2d 1330 (Haw. 1973)). The court "also held *sua sponte* that there was no such legal category as 'normal daily surplus water' and declared that the state, as sovereign, owned and had the exclusive right to control the flow," and "that because the flow of the Hanapepe [stream] was the sovereign property of the State of Hawaii, McBryde's claim of a prescriptive right to divert water could not be sustained against the state." *Robinson*, 753 F.2d at 1470.

In other words, in a dispute between "*A*" and "*B*" over which of them possessed water rights, the Hawaii Supreme Court simply declared "neither of you do, the State owns it all."

The private parties who thought they had owned something for over a hundred years were understandably upset that property they believed they possessed had morphed into public property simply by the stroke of three Justices' pens, and, to add insult to injury, without even the chance to brief the court before it announced the new rule. But after a rehearing on a narrow issue of state law, during which the court rebuffed an attempt by the private parties to raise federal constitutional issues, the court reaffirmed the *McBryde* ruling, with two Justices dissenting. *See McBryde Sugar Co. v. Robinson*, 517 P.2d 26 (Haw. 1973) (per curiam) (*McBryde II*).

Justice Bernard Levinson switched his vote from the first opinion, concluding that it was a "radical departure" from established law, and was a taking:

> Although I voted with the majority of this court in *McBryde Sugar Co. v. Robinson*, 54 Haw. 174, 504 P.2d 1330 (1973) [hereinafter referred to as *McBryde I*], I am constrained to recant that position in view of my current understanding of the problems of this case. In light of the arguments adduced on rehearing, historical evidence discovered upon further research subsequent to the court's previous decision in this case, and a reappraisal of the reasoning supporting that

> decision, it is my opinion that the court committed error in holding that all surplus water belongs to the State and that private water rights, however acquired, may not be transferred to nonappurtenant land. Because of the importance of this case to the development of the law on the subject of Hawaii's water resources, I have undertaken to present a detailed analysis explaining why *McBryde I* is not in keeping with long established and unique principles of Hawaiian water law. Precisely because *McBryde I* is such a radical departure from these principles as they have been heretofore understood, moreover, I have concluded that *McBryde I* effectuates an unconstitutional taking of the appellant's and cross-appellants' property without just compensation and should be reversed on this ground as well.

McBryde II, 517 P.2d at 27 (Levinson, J., dissenting). This Court declined to review the Hawaii Supreme Court.

But that was not the last word. The sugar companies sued state officials in federal district court under 42 U.S.C. § 1983. The district judge held that the Hawaii Supreme Court's *McBryde* decision took property without just compensation, and enjoined the state from enforcing the decision. *See Robinson v. Ariyoshi*, 441 F. Supp. 559 (D. Haw. 1977). On appeal, the Ninth Circuit noted the tortured procedural path the case next took, including a detour back to the Hawaii Supreme Court on certified questions when

the Ninth Circuit asked that court whether it really meant what it said in *McBryde*:

> The leisurely pace of this litigation has produced three oral arguments in this court, two of which were followed by referral of certified questions to the Supreme Court of Hawaii. *See Robinson v. Ariyoshi*, 65 Hawaii 641, 658 P.2d 287 (1982) (*Robinson II*). Following the publication of the state court's answers to the certified questions, the parties briefed the remaining issues that had been narrowed by the earlier proceedings and reargued the case. A number of complex questions remain, but to expedite the matter we will discuss only those essential to a resolution of the main question: Can the state, by a judicial decision which creates a major change in property law, divest property interests?

Robinson, 753 F.2d at 1471. After addressing jurisdictional issues, res judicata, and the *Rooker-Feldman* doctrine, the Ninth Circuit addressed the merits:

> The state conceded at oral argument that the Fourteenth Amendment would require it to pay just compensation if it attempted to take vested property rights. The substantive question, therefore, is whether the state can declare, by court decision, that the water rights in this case have not vested. The short answer is no.

Robinson, 753 F.2d at 1473. The court determined the water rights claimed by the private parties were vested rights, and that neither the state legislature nor the state supreme court can alter those rights without condemnation and payment of just compensation.

By the time *Robinson* again reached this Court, *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) had been decided. Certain regulatory takings cases brought in district courts were not ripe without initial resort to state court processes, and this Court summarily vacated the Ninth Circuit's *Robinson* decision, ordering it to reconsider it in light of *Williamson County's* new ripeness rules. *See Ariyoshi v. Robinson*, 477 U.S. 902 (1986). The Ninth Circuit consequently vacated its earlier order (*Robinson v. Ariyoshi*, 796 F.2d 339 (9th Cir. 1986)) and remanded the case back to the district court, which found the case ripe under *Williamson County*. *See Robinson v. Ariyoshi*, 676 F. Supp. 1002, 1020-21 (D. Haw. 1987). Eventually, the Ninth Circuit vacated the district court's decision and remanded the case with instructions to dismiss because the thirty-one year old case was not ripe under *Williamson County* because the state had not yet implemented the Hawaii

Supreme Court's decision. *Robinson v. Ariyoshi*, 887 F.2d 215 (9th Cir. 1990).[8]

In *County of Hawaii v. Sotomura*, 517 P.2d 57 (Haw. 1973), *cert. denied*, 419 U.S. 872 (1974), in the course of a condemnation action the Hawaii Supreme Court *sua sponte* redefined the seaward boundary of a Torrens-titled[9] littoral parcel from the high water mark to the "upper reaches of the wash of the waves," holding the county owed no compensation for the land seaward of the new boundary line because it was owned by the state.[10] One Justice dissented, noting:

> I will not indulge in an extensive dissertation against the holding, for to do so will be but an exercise in futility. I merely point out that, in my opinion, the holding is plain judicial law-making. That is apparent from the quoted statement in the opinion that the holding is being made "as a matter

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[8] *Robinson* also illustrates how a state court, keenly aware of the finality requirement in *Williamson County*, can tailor a decision and manipulate the ripeness rules to avoid federal court review simply by declaring that the new rule of law is not "final" and is an interlocutory ruling subject to change. State courts, like state and municipal agencies, are presumed not to employ "stupid staffs." *See, e.g.*, *Lucas*, 505 U.S. at 1025-6 n.12.

[9] In a Torrens system the state guarantees title, including a parcel's boundaries.

[10] The trial court awarded nominal compensation of one dollar to the property owner for the condemnation of this property, but the Hawaii Supreme Court declared that was error and took the dollar away because the land was not private property under the newly-announced rule.

> of law," and from the following reason given therefor: "*Public policy, as expressed by this court*, favors extending to public use and ownership as much as possible of Hawaii's shoreline as is reasonably possible."

Sotomura, 517 P.2d at 189 (Marumoto, J., dissenting) (emphasis original).

The property owners brought suit in federal district court for due process violations. The court determined "[j]udicial transfers of title to private lands to the State which do not permit the owner an opportunity to be heard or to present evidence is not constitutionally valid. Whenever a party is to be deprived of property, he is entitled to a meaningful hearing before the fact." *Sotomura v. County of Hawaii*, 460 F. Supp. 473, 478 (D. Haw. 1978). The district court concluded:

> This Court fails to find any legal, historical, factual or other precedent or basis for the conclusions of the Hawaii Supreme Court that, following erosion, the monument by which the seaward boundary of seashore land in Hawaii is to be fixed is the upper reaches of the wash of the waves. To the contrary, the evidence introduced in this case firmly establishes that the common law, followed by both legal precedent and historical practice, fixes the high water mark and seaward boundaries with reference to the tides, as opposed to the run or reach of waves on the shore. For example, on the Island of Hawaii, the seaweed line was used

> to indicate the level of the high tides and high water mark. The decision in *Sotomura* was contrary to established practice, history and precedent and, apparently, was intended to implement the court's conclusion that public policy favors extension of public use and ownership of the shoreline. A desire to promote public policy, however, does not constitute justification for a state taking private property without compensation.

Id. at 480-81. The state's appeal to the Ninth Circuit was dismissed as untimely.

Earlier, in *In re Ashford*, 440 P.2d 76 (Haw. 1968), the Hawaii Supreme Court rejected over 100 years of its own precedent holding the boundary between public and private property on Hawaii's beaches was the mean high water line. The *Ashford* court disregarded these established precedents and changed the legal boundary of littoral parcels from the mean high water line to the "upper reaches of the waves," effectively confiscating for the public 20 to 30 lateral feet of what had until then always been private property. *Ashford*, 440 P.2d at 77. The court reached this result by reinterpreting the term *ma ke kai* ("along the sea" in Hawaiian) in the parcel's royal patent, concluding the earlier cases all misunderstood the true meaning of the phrase. The court concluded the King who executed the royal patent must have been ignorant of the survey data and therefore could not have intended to grant the land below the upper reaches of the waves. To reinterpret *ma ke kai*, the

court turned to oral testimony and reputation evidence regarding "customary" usage of the shoreline. *Id.* One Justice dissented, noting the majority relied on "spurious historical assumptions," and concluded there was nothing in ancient tradition, custom, practice, or usage which dictated the use of the upper reaches of the waves instead of the mean high water mark as established by the earlier cases. *Ashford*, 440 P.2d at 93 (Marumoto, J., dissenting).

B. Eliminating The Right To Exclude By Custom

Applying "custom," in *State* ex rel. *Thornton v. Hay*, 462 P.2d 671 (Or. 1969), the Oregon Supreme Court held that littoral property owners had no rights to the dry sand area of beaches because:

> [F]rom the time of the earliest settlement to the present day, the general public has assumed that the dry-sand area was a part of the public beach, and the public has used the dry-sand area for picnics, gathering wood, building warming fires, and generally as a headquarters from which to supervise children or to range out over the foreshore as the tides advance and recede.

Id. at 673. After this Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) which held that background principles did not include law "newly legislated or decreed," the Oregon Supreme Court considered whether application of the *Thornton* rule was a taking. In *Stevens v. City of*

Cannon Beach, 854 P.2d 449 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994), the court held *Thornton* was not newly legislated or decreed and was not a sudden change in Oregon's property law. *Thornton*, the court held, "did not create a new rule of law," but "merely enunciated one of Oregon's 'background principles of . . . the law of property.'" *Id.* at 456 (quoting *Lucas*, 505 U.S. at 1029).

Similarly, in *Public Access Shoreline Hawaii v. County of Hawaii Planning Comm'n*, 903 P.2d 1246 (Haw. 1995), *cert. denied*, 517 U.S. 1163 (1996), the Hawaii Supreme Court redefined the nature of fee simple absolute ownership, and abandoned the "Western concept of exclusivity" to impose a blanket easement retroactively over all Hawaii property. The case arose as a dispute over the standing of native Hawaiians to intervene in an agency hearing regarding a coastal permit sought by a property owner. *Id.* at 1250. The agency denied standing, concluding the native Hawaiians did not have interests different from the general public. The Hawaii Supreme Court determined native Hawaiians did possess unique rights, because custom dictated that Hawaii property owners never possessed the right to fully exclude native Hawaiians who wished to exercise "customary and traditional practices" on private property. *Id.* at 1268. The court found its decision did not work a judicial taking or a regulatory taking because the custom was a "background principle" of Hawaii property law, despite the fact it eliminated the right to exclude:

> Our examination of the relevant legal developments in Hawaiian history leads us to the conclusion that the western concept of exclusivity is not universally applicable in Hawaii. In other words, the issuance of a Hawaiian land patent confirmed a limited property interest as compared with typical land patents governed by western concepts of property.

Id. at 1268 (citing *Stevens*, 854 P.2d at 456 ("[w]hen plaintiffs took title to their land, they were on [constructive] notice that exclusive use . . . was not part of the 'bundle of rights' that they acquired").

C. Expanding The Scope Of The Public Trust

The public trust doctrine, which was traditionally applied only to tidelands and navigable waters, has been judicially extended to other natural resources deemed worthy by courts of public ownership. *See, e.g.*, *Center for Biological Diversity, Inc. v. FPL Group, Inc.*, 83 Cal. Rptr. 3d 588, 595-96 (Cal. Ct. App. 2008) (public trust doctrine covers wildlife and is not limited to navigable waters and tidelands); Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 467 (1970) ("certain interests are so particularly the gifts of nature's bounty that they ought to be reserved for the whole of the populace.").

Without constitutional limitations on state courts' abilities to enlarge the scope of the public

trust, the doctrine could effectively swallow up the concept of private property. For example, in *Matthews v. Bay Head Imp. Ass'n*, 471 A.2d 355 (N.J.), *cert. denied*, 469 U.S. 821 (1984), the New Jersey Supreme Court held the privately owned dry sand beach area of littoral property was subject to the public trust. The court expanded the geographic scope of the trust from tidelands and navigable waters to the dry beach because the public *needed* access in order to exercise its public trust rights in tidelands:

> Exercise of the public's right to swim and bathe below the mean high water mark may depend upon a right to pass across the upland beach. Without some means of access the public right to use the foreshore would be meaningless. To say that the public trust doctrine entitles the public to swim in the ocean and to use the foreshore in connection therewith without assuring the public of a feasible access route would seriously impinge on, if not effectively eliminate, the rights of the public trust doctrine.

Id. at 364. The court held the public trust doctrine should "be molded and extended to meet changing conditions and needs of the public it was created to benefit." *Id.* at 365 (quoting *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 55 (N.J. 1972)). *See also National Audubon Soc. v. Superior Court*, 658 P.2d 709 (Cal.), *cert. denied*, 464 U.S. 977 (1983) (property owners who purchase property subject to public trust do not state takings claims).

Similarly relying on the public trust doctrine, the Hawaii Supreme Court in *State of Hawaii v. Zimring*, 566 P.2d 725 (Haw. 1977), ignored its prior precedent regarding construction of shoreline property descriptions, and held the public owns land created by volcanic action. In 1955, the active volcano on the island of Hawaii created 7.9 acres of new land when lava flowed into the ocean. *Id.* at 727. The state assessed the littoral landowner property taxes on the new land, but thirteen years later sought to quiet title in itself, asserting public ownership of the new fast land. *Id.* at 738. The littoral owner's boundary description extended ownership to the "high water mark." The Hawaii Supreme Court, however, disregarded the accepted meaning of this term, holding instead the description was merely a "natural monument" and not an "azimuth and distances" description. *Id.* at 745 (Vitousek, J., dissenting). Consequently, the court vested title to the new land in the state because to adhere to the deed's language would, in the court's view, result in an inequitable "windfall" that should not "enrich" of any one landowner, but rather should inure to the collective public. *Id.* at 734-35.

CONCLUSION

As the decisions detailed above demonstrate, the judicial branch of state government is just as capable of taking property without just compensation and due process as are the legislative and executive branches.

The judgment of the Florida Supreme Court should be vacated, and the case remanded.

September 2009.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-1151

In the

Supreme Court of the United States

STOP THE BEACH RENOURISHMENT, INC.,

Petitioner,

v.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, et al.,

Respondents.

On Petition for Writ of Certiorari to the Florida Supreme Court

MOTION FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

NICHOLAS M. GIESELER
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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to this Court's Rule 37.2, Pacific Legal Foundation respectfully requests leave of the Court to file this brief amicus curiae in support of Petitioner.

Written consent to the filing of this brief has been granted by counsel for Petitioner, and counsel for Respondent, Florida Department of Environmental Protection. Counsel for Respondents, Walton County and City of Destin, did not respond to amicus's request for consent, necessitating the filing of this motion.

DATED: April, 2009.

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QUESTION PRESENTED

The Florida Supreme Court invoked "nonexistent rules of state substantive law" to reverse 100 years of uniform holdings that littoral rights are constitutionally protected. In doing so, did the Florida Court's decision cause a "judicial taking" proscribed by the Fifth and Fourteenth Amendments to the United States Constitution?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioner Stop the Beach Renourishment, Inc.[1]

Pacific Legal Foundation (PLF) was founded over 30 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF has participated in numerous cases before this Court both as counsel for parties and as amicus curiae. PLF attorneys litigate matters affecting the public interest at all levels of state and federal courts and represent the views of thousands of supporters nationwide who believe in limited government and private property rights.

PLF represented property owners in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997), and *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987), and participated as amicus curiae in *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005), and *Haw.*

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[1] Counsel of record for all parties received notice of amicus curiae's intention to file this brief. Due to misinterpretation of the Court's docket entry extending time to file a response to the petition (and thus the due date for the amicus brief), counsel received six days' notice of amicus's intent to file. Letters evidencing consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Hous. Auth. v. Midkiff, 467 U.S. 229 (1984). PLF attorneys appeared as amicus curiae in the court below in support of Petitioner. *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102 (Fla. 2008).

Because of its history and experience with regard to private property rights and the limits on government power to take property without paying just compensation, PLF believes its perspective will aid this Court in considering the petition.

SUMMARY OF ARGUMENT

In the opinion below, the Florida Supreme Court departed from long-established state law protecting the property rights of beachfront landowners. *Id.* So drastic was this departure from settled precedent that it functionally eliminated fundamental constitutional protections that owners of beach property had relied upon for nearly a century. As Justice Lewis of the Florida Supreme Court noted in his dissent from the majority opinion, the court's holding made vanish, without any hearing or the payment of just compensation, the entirety of the beachfront owners' littoral rights. *Id.* at 1122 (Lewis, J., dissenting).

Despite occasional language on the matter, this Court never has formally addressed the question of whether state court departures from established principles of property law can effect a taking, or violate an owner's due process rights, under the Federal Constitution. This Court has sanctioned, and applied, such an approach in a variety of other contexts, holding that state court decisions, just like actions of the

executive and legislative branches, can violate persons' constitutional rights.

This Court should grant the petition in order to answer the question, without ambiguity, of whether owners of private property may avail themselves of similar protections. There is no textual or theoretical reason to deny property owners this protection. In fact, the realities of modern property law, particularly after this Court's opinion in *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992), illustrate the need for property owners to be protected against state courts that abrogate fundamental property rights via the judicial takings doctrine.

REASONS FOR GRANTING THE WRIT

I

THE FLORIDA SUPREME COURT'S OPINION RAISES AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN SETTLED BY THIS COURT

A. Justices of This Court Have Addressed the Question of Judicial Takings in Concurring Opinions and Dissents

The Fourteenth Amendment to the United States Constitution, incorporating the Fifth Amendment's protections, forbids states from taking private property for public use without just compensation. *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 242-43 (1897). The most obvious of these prohibited takings

occurs when a government entity physically confiscates, occupies, or invades private property. *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). So too must government pay just compensation when it regulates property to the extent that it is taken for constitutional purposes. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538-541 (2005).

While these takings of private property typically arise from legislative or administrative acts, the question remains whether actions of state courts can give rise to similar government liability. Known colloquially as the doctrine of "judicial takings"—though such scenarios implicate both the Takings Clause and guarantees of due process—this specific question has been asked of this Court before. Fifteen years ago, this Court denied a petition for writ of certiorari filed by the owners of beachfront property in Oregon. *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 114 S. Ct. 1332 (1994). The petitioners in *Stevens* alleged that the Oregon Supreme Court's application of the doctrine of customary use effected a taking of their private property, without just compensation, in violation of the Fifth and Fourteenth Amendments.

In dissenting from the Court's denial, Justice Scalia, joined by Justice O'Connor, invoked this Court's opinion in *Lucas*, 505 U.S. 1003, for the proposition that certain principles inherent in the right to security in private property are so fundamental as to require payment when they are abrogated by state action. *Stevens*, 114 S. Ct. at 1331 (Scalia, J., dissenting). In Justice Scalia's reading, this holds true whether the

state actor applying such restrictions is the executive, the legislature, or the judiciary: "No more by judicial decree than by legislative fiat may a State transform private property into public property without just compensation." *Id.*

Justice Scalia's dissent recognized the general rule that "the Constitution leaves the law of real property to the States." *Id.* However, "just as a State may not deny rights under the Federal Constitution through pretextual procedural rulings, neither may it do so by invoking nonexistent rules of state substantive law." *Id.* (citation omitted). Justice Scalia concluded that he would grant the petition to determine whether the lower court's ruling violated the property owners' due process rights. *Id.* at 1335-36. He also wrote that he would apply this theory of constitutional protection to takings claims in general. *Id.* This, even though the petition was founded entirely on a state court decision, implicating no split among federal circuits.

There are opinions of this Court that mirror Justice Scalia's view of the validity of the judicial takings doctrine. The clearest and most influential opinion of the kind is Justice Stewart's concurrence in *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring). In *Hughes*, an owner of upland property sought a determination of the ownership of accretions that had gradually formed along her beachfront property. *Id.* at 291. The land was conveyed to the landowner prior to the formation of what became the State of Washington. *Id.* At the time of the conveyance, the common law rule was that an owner of property bordering the ocean had the right

to include within his title any accretion gradually built up by the movement of the tides. *Id.*

This Court considered the issue of who owned the accreted land the state or the upland private owner—and held that the upland owner was to remain the sole owner of the property. *Id.* at 294. In his concurrence, Justice Stewart emphasized that property owners have valid claims under the Takings Clause where state courts suddenly depart from settled property law to the detriment of private owners:

> To the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.

Id at 296-97 (Stewart, J., concurring).

Justice Lewis, dissenting from the Florida Supreme Court's opinion in the case below, shared many of the concerns elucidated by Justice Stewart in his concurrence in *Hughes*. Justice Lewis wrote that the majority's decision summarily altered the definition of littoral property that had governed in

Florida for nearly a century: "In this State, the legal essence of littoral or riparian land is contact with the water. Thus, the majority is entirely incorrect when it states that such contact has no protection under Florida law and is merely some 'ancillary' concept that is subsumed by the right of access." *Stop the Beach Renourishment*, 998 So. 2d at 1122. Justice Lewis recognized that it was the Florida Supreme Court's novel interpretation of the state statute in question, and not the statute itself, that violated the well-established constitutional rights of the beachfront property owners. Writing of these owners' fundamental right to have their property maintain contact with the water, Justice Lewis wrote that "[t]he majority now avoids this inconvenient principle of law—and firmly recognized and protected property right[s]" by ignoring decades of settled state law on the matter. *Id.* at 1123. This Court should grant the petition to determine whether such a decision effects a taking of private property and violates the due process rights of the property's owners.

B. In Several Contexts, This Court Has Recognized That State Court Departures from Established Law Can Violate Fundamental Rights

Justice Stewart's concurrence in *Hughes* finds analogues in other Court decisions holding that sudden judicial departures from settled state law violate citizens' rights as guaranteed by the Federal Constitution. For example, in *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980), this Court considered a Florida Supreme Court decision upholding as constitutional a state statute permitting

counties to seize the interest accruing on an interpleader fund paid into by private citizens and maintained by county courts. *Id.* at 155-56. As in the present case, the Court's analysis focused not as much on the relevant Florida statute as on the Florida Supreme Court's opinion interpreting that statute. This Court found that the Florida court's holding was unconstitutional, and that "[n]either the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as 'public money' because it is held temporarily by the court." *Id.* at 164. This Court concluded with a statement precisely on point for the present case: "a State, by *ipse dixit*, may not transform private property into public property without compensation . . . ." *Id.*

Similarly, in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), this Court was faced with a constitutional challenge to a state court decision that departed significantly from established jurisprudence governing a basic right. In *Bouie*, the South Carolina Supreme Court applied an entirely new construction of a criminal trespass statute in order to uphold the convictions of two alleged trespassers. *Id.* at 362. This interpretation was such a departure from settled state law that this Court held it amounted to the imposition of an ex post facto law in violation of the petitioners' due process rights. *Id.* In the *Bouie* Court's view, a state may not avoid constitutional restrictions on its power merely by delegating the restriction to the courts instead of having them instituted by the elected branches: "If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due

Process Clause from achieving precisely the same result by judicial construction." *Id.* at 353-54.

These are but two examples of this Court's decisions that extend constitutional protections to judicial actions. There are perhaps scores of similar opinions. *See, e.g., NAACP v. Ala. ex rel. Flowers*, 377 U.S. 288, 306-08 (1964) (Alabama courts' injunction against NAACP operations in state violated Due Process Clause); *NAACP v. Ala. ex rel. Robinson*, 357 U.S. 449, 463 (1958) ("It is not of moment that the State has here acted solely through its judicial branch, for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize."). This Court's First Amendment jurisprudence is particularly notable for holding state judiciaries accountable for constitutional violations, where state courts "assert[] retroactively" that private actors had no right to exercise their First Amendment liberties. *Org. for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (state court injunction forbidding distribution of pamphlet violated First Amendment); *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175 (1968) (state court injunction against rally violated right to free speech); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (vacating state court restriction on publication).

II

THIS COURT SHOULD GRANT THE PETITION AND APPLY CONSTITUTIONAL PROTECTIONS TO PROPERTY OWNERS WHOSE RIGHTS ARE ABROGATED BY JUDICIAL ACTION

This Court captured the theoretical basis for the judicial takings doctrine in its opinion in *Lucas*. In that case, the Court recognized that certain basic principles of property ownership are so fundamental as to be beyond the reach of the state, unless the state is willing to pay the owner for his property. *Lucas*, 505 U.S. at 1029-30. This Court arrived at that holding in part by way of negative examples; that is, by pointing to certain uses of property that, historically, *never* were lawful (and thus, the regulation of which could not require just compensation), the Court distinguished those incidents of ownership that *always* were lawful. *Id.* at 1030-31.

Despite this distinction, this Court's *Lucas* opinion does not establish which aspects of property fit into which category. "This ambiguity has provided states with a loophole in the *Lucas* rule large enough to circumvent the rule entirely, provided that state courts are willing to be rather creative in defining background legal principles." W. David Sarratt, *Judicial Takings and the Course Pursued*, 90 Va. L. Rev. 1187, 1189 (2004). "States may thus attempt to avoid compensation altogether by announcing that under their background principles of state law, the property owner never had the property right she claims has

been taken. Of course, state courts can pull off this ploy better than state legislatures." *Id.* at 1490.

It is this reality that makes the theory of judicial takings necessary for protecting property rights. As Sarratt notes, the job of defining what constitutes a *Lucas* background principle, existing perhaps for centuries, is more appropriate for the judiciary. This is because "legislatures are presumed to act prospectively, saying what the law shall be, while courts are presumed to decide questions retrospectively, saying what the law is and has been." *Id.* at 1491. Sarratt writes:

> [W]hen state courts are understood to wield the power not only to declare the law, but also to make it, the *Lucas* rule's background-principles exception invites state courts to reshuffle property rights in ways that state legislatures cannot, potentially allowing the state to avoid paying compensation for takings of property.

Id.

Premising his conclusion in part on this Court's holding in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("[W]hether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."), Sarratt views federal application of the judicial takings doctrine as necessary. Sarratt, *supra*, at 1496-97. Since *Erie* stands for the proposition that state courts are permitted to "make real law on behalf of the state," *id.* at 1496, a state court's departure from

established law must be treated by federal courts "as wielding real lawmaking power—including the ability to take property." *Id.* at 1497.

As Professor David J. Bederman has written, the judiciary's ability to wield its power to make law is pronounced in property rights cases involving beach property, where judge-made law of custom governs. David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 Colum. L. Rev. 1375, 1438-39 (1996). Citing "custom as an end-run around *Lucas*," Bederman writes of examples of state supreme courts having "obliterated constitutional requirement[s] (whether articulated in a takings or due process idiom)" relating to property rights by invoking common law principles of custom that the courts themselves have developed.[2] *Id.* at 1442-43. The danger in beach cases like *Stevens* and the case below, generally, is that in the absence of federal review, state courts are free to fashion whatever rules they choose without being cabined by constitutional boundaries.

Writing in the Virginia Law Review in 1990, Barton H. Thompson, Jr., authored what is widely recognized as the "seminal article on the judicial takings problem." *See* Sarratt, *supra*, at 1494.

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[2] Whether judicial takings challenges are properly grounded in takings or due process law, or both, is unsettled even among those who are proponents of the general doctrine. Justice Scalia's *Stevens* dissent, for example, contemplates the doctrine applying to both takings and due process under some circumstances. 114 S. Ct. at 1335-36. Others, such as Roderick E. Walston, advocate its application only to due process claims. *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 Utah L. Rev. 379, 434-36 (2001).

Arguing, two years before *Lucas*, that state courts were too eager, and too able, to take private property without repercussion, Thompson noted that

> [c]ourts have the doctrinal tools to undertake many of the actions that legislatures and executive agencies are constitutionally barred from pursuing under the takings protections–and pressure is mounting for courts to use these tools. Indeed, while paying lip service to stare decisis, the courts on numerous occasions have reshaped property law in ways that sharply constrict previously recognized private interests. Faced by growing environmental, conservationist, and recreational demands, for example, state courts have recently begun redefining a variety of property interests to increase public or governmental rights, concomitantly shrinking the sphere of private dominion.

Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449, 1451 (1990).

In the nearly two decades since Thompson wrote these words, the pressures he identified only have increased. Perversely, this Court's opinion in *Lucas*, offering greater protections for owners of private property, perhaps has left state courts even more free to effect takings of private property, as they step in where legislatures and executives now are more afraid to tread. This Court should grant the petition in order to set boundaries for such state court action, and to

finally and unambiguously answer the question of the scope of the judicial takings doctrine.

CONCLUSION

As Thompson wrote in 1990, "[t]he United States Supreme Court's reluctance to apply the takings protections to courts proved particularly puzzling [ ] when one compares the Court's treatment of other constitutional restrictions that, unlike the takings protections, are essentially noneconomic." Thompson, *supra*, at 1456. "Even where the Court has concluded that a specific noneconomic protection does not directly apply to the judiciary, the Court has sometimes extended the protection to judicial actions, using a more general constitutional provision." *Id.* at 1457. This Court should grant the Petition for Writ of Certiorari to fully consider extending such constitutional protection to owners of property threatened by the actions of state courts.

DATED: April, 2009.

Respectfully submitted,

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AMICUS CURIAE BRIEF

005-42K45P(15)

No. 08-1151

SUPREME COURT, U.S.
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In The
Supreme Court of the United States

STOP THE BEACH RENOURISHMENT, INC.,

Petitioner,

v.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, ET AL.,

Respondents.

On Writ Of Certiorari To The Florida Supreme Court

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INTEREST OF *AMICI CURIAE*[1]

Save Our Beaches ("SOB") is a Florida non-profit corporation founded in 2004 to protect private property rights as set forth in the United States and Florida Constitutions. More specifically, SOB was founded to defend the natural resources of the City of Destin beaches from unauthorized, unnecessary and inappropriate beach restoration activities. SOB is charged to seek redress for past, present and future unauthorized, unnecessary and inappropriate restoration activities and public uses in, on and around the beaches by any and all legal means, including judicial and administrative litigation. SOB was a party earlier in the litigation of the case before the Court, but was removed for lack of standing. After being subjected to the governments' continued violations of their constitutional rights, SOB sought the counsel of Southeastern Legal Foundation ("SLF").

Founded in 1976, SLF is a national constitutional public interest law firm and policy center that advocates limited government, individual economic freedom, and the free enterprise system. SLF strives

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to and been notified of the filing of this brief.

to protect private property rights and the environment, but believes that the environment can be protected without destroying the individual freedoms guaranteed by the Constitution.

In pursuit of its goals, SLF has represented numerous plaintiffs whose property rights have been infringed, including SOB. SLF currently represents SOB in a suit charging the City of Destin with violations of its members' and other beach property owners' right to equal protection of law.

For these reasons, SOB and SLF respectfully submit this brief in support of Petitioner and urge the Court to reverse the judgment below.

SUMMARY OF ARGUMENT

How many ways are there to skin a cat? In the instant case, local governments have tried any number of ways to achieve by fiat what cannot be achieved except by well-established constitutional process – taking private property with unique characteristics for perceived "public good."

The present case is about more than environmental protection, beach restoration, or the public good. It is about using protection of the environment as a pretense to circumvent legitimate methods for establishing property rights in order to accomplish otherwise impermissible goals. In spite of the Florida Supreme Court's resolve that the governments'

actions are legitimate state actions effected in pursuit of the constitutional duty to protect Florida's beaches, evidence shows that the local governments are concerned with more than simply the protection of beach property. The court has permitted Walton County ("County") and the City of Destin ("City") to obliterate constitutionally protected private property rights under the guise of "environmental protection." Moreover, Florida's city and county governments ignored the customary use requirements for establishing public rights to use private property by simply declaring the existence of such rights. Finally, the City has violated private beach property owners' right to equal protection of the law by intentionally refusing to enforce trespass laws on those properties. Thus, the Florida Supreme Court has permitted local governments to take private property without adhering to the judicial procedures established for lawfully effecting such a taking.

The City's specific actions, which have a direct and negative impact on private property rights, cannot be explained by beach restoration goals. To permit Florida governments to convert valuable private property to public use under the pretense of protecting the environment and without abiding by lawful and firmly established procedures directly harms the constitutionally guaranteed right to the full use and enjoyment of private property, a fundamental right in the American system.

There are ways of protecting Florida's beaches other than infringing the rights of private property

owners, and there are ways of obtaining private property interests other than by infringing private property owners' constitutional rights. Florida governments can obtain rights to private property by using the power of eminent domain. Alternatively, they can establish the public's customary use of private property in court proceedings. The County and City have not pursued either of the avenues for legitimately establishing the public's right to use private property, however, and there is no reasonable basis for permitting the County and City to take private property rights under the guise of environmental protection when judicially established avenues are available.

ARGUMENT

I. THE GOVERNMENTS' JUSTIFICATION OF ENVIRONMENTAL PROTECTION IS MERELY A PRETENSE FOR ESTABLISHING PUBLIC RIGHTS TO USE PRIVATE PROPERTY.

In *Mugler v. Kansas*, 123 U.S. 623, 661 (1887), the Court stated, "It does not . . . follow that every statute enacted ostensibly for the promotion of [the protection of the public morals, health and safety] is to be accepted as a legitimate exertion of the police powers of the state." Similarly, it does not follow that every action of state, city or county government taken ostensibly for the promotion of the public good should be accepted as a legitimate use of governmental

power. "The courts are not bound by mere forms, nor are they to be misled by mere pretenses." *Id.* Thus, if the government purports to take an action for the public good, but that action "is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and . . . give effect to the Constitution." *See id.*

In the present case, the County and City have acted ostensibly in pursuit of the state's duty to protect Florida's beaches. However, not all of the actions taken by the local governments can be explained by this purpose, and many of their actions have invaded the rights secured to property owners by Florida common and statutory law and by the U.S. Constitution. Florida's local governments took actions exposing the real purpose behind their beach restoration activities: to convert valuable private beach property to public use.

A. The Alternative Motive of the County and City to Convert Private Property to Public Use Is Evident.

i. The need for public beach space is great.

Since 1980, the population of Florida has increased by over 3 million people,[2] and in 2005, it

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[2] *Florida: Population of Counties by Decennial Census: 1900 to 1990* (Richard L. Forstall ed., U.S. Bureau of the Census,

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was expected to continue increasing by an average yearly increase of "1,000 people per day, through 2010."[3] Moreover, this population growth has disproportionately occurred in the City and the County. In the County, the population nearly doubled between 1980 and 2000, increasing by 46.3 percent between 1990 and 2000.[4] Based on data from 2000 to 2003, it is ranked as "the 7th fastest growing county in the state of Florida."[5] In Okaloosa County, where the City is located, the population increased by over 80,000 people between 1970 and 2000, increasing by 24.6 percent between 1970 and 1980, by 30.8 percent between 1980 and 1990, and by 18.6 percent between 1990 and 2000.[6] "Okaloosa County's population is

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1995), *available at* http://www.census.gov/population/cencounts/fl190090.txt (last visited Aug. 14, 2009).

[3] Rodney L. Clouser & Hank Cothran, *Issues at the Rural-Urban Fringe: Florida's Population Growth, 2004-2010*, Univ. Fla., Aug. 2005, at 1, 1, *available at* http://edis.ifas.ufl.edu/pdffiles/FE/FE56700.pdf (last visited Aug. 14, 2009).

[4] *See* U.S. Census Bureau, *Population – Total and Selected Characteristics, Walton, FL, available at* http://censtats.census.gov/usa/usa. shtml (select "Florida," "Walton, FL," and "Population – Total and Selected Characteristics" from the drop down menus; then click "Go") (last visited Aug. 14, 2009).

[5] *Population Growth of Counties, Florida, Population change, 2000 to 2003*, ePodunk http://www.epodunk.com/top10/countyPop/coPop10.html (last visited Aug. 14, 2009).

[6] *See* U.S. Census Bureau, *Population – Total and Selected Characteristics, Okaloosa, FL, available at* http://censtats.census.gov/usa/usa.shtml (select "Florida," "Okaloosa, FL," and "Population – Total and Selected Characteristics" from the drop down menus; then click "Go") (last visited Aug. 14, 2009).

growing at a rate of more than 250 people per month, with 213,623 residents projected by the year 2010."[7]

This population growth has a significant impact and influence on "water and land allocation [issues], state and community infrastructure needs, and demands for local goods and services."[8] Florida's growing population, however, is not the only reason public beaches are becoming more crowded. After "two years of strong growth in 2004 and 2005," "[o]ut-of-[s]tate tourism in Florida amounted to 84 million person trips in 2006."[9] In 2006, "[o]ut-of-state tourism in [Florida had] increased by 19.9 percent since 2000."[10] Further, it is estimated that "2.2 million Floridians vacationed at the state's beaches in 2006."[11] Statistics from other websites suggest the number of visitors is only increasing.[12] As a result, local governments'

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[7] Okaloosa County Online, Public Works, Resources Division – Parks http://www.co.okaloosa.fl.us/dept_pw_resources_parks.html (last visited Aug. 14, 2009).

[8] Clouser & Cothran, *supra* note 3, at 1.

[9] Dept. of Econ. et al., *Florida Visitor Study* 1 (FAU Ctr. for Urban & Envtl. Solutions, Feb. 2008), *available at* http://www.cuesfau.org/publications/Florida%20Visitor%20Study%20-%20 February%202008.pdf (last visited Aug. 14, 2009).

[10] *See id.* at 3.

[11] *Id.* at 5.

[12] *See* Howard Group, Our Market http://www.howardgrp.com/our_market.html ("Walton and Okaloosa counties collectively saw over 7.6 million visitors in 2008, an increase of 9% over 2007"; "Walton County alone saw over three million visitors in 2008, an increase of 20% from 2007"; "over 80% of visitors return to Beaches of South Walton for their vacation

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desire and perceived need for more public beach space in a rapidly growing section of the Florida coast has resulted in hasty and ill-advised policies.

ii. The City's actions reflect a desire to create more public beach space.

In its rush to combat a perceived beach space problem, the City took steps contrary to private property rights. In June 1999, the City Council considered an ordinance which purported to establish a public right to use all of the dry sand area landward of the mean high water line ("MHWL") except a small area reserved for the fee owner. In June 2000, the City enacted a beach ordinance, which removed the requirement that vendors cannot operate within twenty feet of the property lines of adjacent property owners and which prohibited beach vendors from providing goods and services closer than twenty feet from the water's edge, ten feet farther from the MHWL than was previously permitted – effectively pushing vendors farther from the ocean and onto private properties. Later, the City issued a directive to the Okaloosa County Sheriff's Office, the law enforcement body for the City, instructing the Sheriff

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destination"; "[t]he Northwest Florida Gulf Coast area remains the second most popular drive-to destination in the Southeast"; and "the number of visitors [to Walton County] is up 185% over the last five years.") (last visited Aug. 14, 2009).

not to enforce Fla. Stat. Ann. § 810.09(1)(a) (2009), a criminal trespass law, against persons trespassing on private beach properties when the trespass occurs within twenty-five feet of the MHWL. The Sheriff has complied with this instruction in spite of the policy violating private property rights. When complaints arose, the City articulated its intention to continue to permit the public to use private property. In April 2005, the City passed another ordinance, this time prohibiting vendors from blocking pedestrian use between the ocean and a line twenty feet inland of the MHWL, even though no such pedestrian right of use has ever been established in Florida courts. By these actions, the City intended to open private property to public use; the "environmental protection" rationale fails to justify these constitutional takings.

iii. The City's actions reflect an understanding of private property rights and a lack of concern for whether its actions infringe such rights.

Even when the City purported to act in the interests of beach preservation through beach scraping on private properties, its actions reflected an understanding and deliberate disregard of private property rights.

In December 2004, the Department of Environmental Protection ("DEP") issued a permit for beach scraping activities which did not give authority to scrape on any properties owned by persons who

elected not to have the scraping conducted on their properties. The beach scraping permits authorized the City to place excavated material up to the dune escarpment or the pre-storm dune line on properties of persons who gave consent, farther inland than the MHWL or erosion control line ("ECL") which was the boundary of private properties. Thus, beach renourishment would entail placing thousands of tons of sand on private properties and between private properties and the ocean. In 2005, the City repeatedly acknowledged it required easements from affected property owners before entering upon private property to conduct beach restoration. The City was unsuccessful in its efforts and only obtained a minority of property owners' consents, but the City scraped private properties anyway.

Because the City disregarded private property owners' objections, DEP issued a second permit in March 2005 expressly excluding SOB members' properties from the authorization of the permit. The City subsequently managed to remove the limitation with the proviso that it either obtain each property owner's written permission or proceed under the City's police powers or other appropriate authority. The amended permit expressly stated it did not authorize trespass of any type under any circumstances. When SOB members did not give the City permission to scrape their beaches, the City purported to justify the beach scraping as an emergency measure necessary to protect beachfront structures from storm damage. The effort did little to protect

beach structures, however, and quickly eroded within a few months.

After these attempts by the City to justify beach scraping on private property without permission, a subsequent permit expressly stated:

> This permit does not convey to the permittee or create in the permittee any property right, or . . . interest in real property, nor does it authorize any entrance upon or activities on property which is not owned or controlled by the permittee. The issuance of this permit does not convey any vested rights or . . . exclusive privileges.[13]

Regardless of this express limitation, the City continues beach scraping activities, with and without property owners' permission.

The City's actions demonstrated it knew the dry sand area of the beach, above the MHWL, was privately-owned property, necessitating permission to use or scrape. When the City, under the pretense of protecting Florida's beaches, was unable to obtain permission, however, it continued its actions in spite of property owners' objections. The City's rationale of environmental protection is no more than a means to

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[13] Consolidated Joint Coastal Permit and Sovereign Submerged Lands Authorization, 3, No. 0218419-001-JC (July 2005) *available at* http://bcs.dep.state.fl.us/env-prmt/okaloosa/pending/0286575_Western_Destin_Beach_Restoration_Project/Application/Attachment%20J%20-%20Permit%20No.%200218419-001-JC%20(07-28-05).pdf (last visited Aug. 14, 2009).

accomplish that which it is unauthorized to do otherwise.

iv. The Florida Supreme Court's opinion reflects an understanding of the littoral rights being infringed and an effort to redefine those rights to keep them from impeding Florida's beach restoration program.

In the present case, the Florida Supreme Court followed in the City's footsteps, making every possible effort to avoid recognizing private property rights in order to uphold what it deems good public policy. This side-stepping by the court is quite evident throughout its opinion. The court began its opinion by recognizing case law which clearly defined littoral rights as including "the following vested rights: . . . the right of access to water, including the right to have the property's contact with the water remain intact" and "the right to receive accretions and relictions to the property." *See Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1111 (Fla. 2008); *Bd. of Trs. v. Sand Key Assocs., Ltd.*, 512 So. 2d 934, 936 (Fla. 1987) (citations omitted). The court additionally recognized that "littoral rights are private property rights that cannot be taken from upland owners without just compensation," *Walton County*, 998 So. 2d at 1111 (*quoting Sand Key*, 512 So. 2d at 936). However, the court interpreted a statement from a prior decision that "the exact nature of these rights rarely has been described in

detail," *id.* at 1111 (*quoting Webb v. Giddens*, 82 So. 2d 743, 745 (Fla. 1955)), to mean the court was free to redefine any of the littoral rights that had been affirmatively recognized by common or statutory law into nonexistence. *See id.* at 1112 (reasoning that the vested "right to accretion . . . is a contingent, future interest that only becomes a possessory interest if and when land is added to the upland by accretion").

First, the court addressed the right to accretions, asserting the state could usurp the right if it also took away the conditions necessary to claim the right. *See id.* at 1118-19 (Since "[n]one of these doctrinal reasons apply here," "the common law rule of accretion, . . . is not implicated in the context of this Act"). The court failed to address all of the reasons for the right, however, disregarding its holding in *Florida National Properties* and other cases that the littoral right to accretions exists partly to protect the littoral right to maintain upland property's contact with the MHWL. *Hughes v. Washington*, 389 U.S. 290, 293 (1967) (recognizing that losing the law of accretions "would leave riparian owners continually in danger of losing [their property's] access to water which is often the most valuable feature of their property"); *State v. Fla. Nat'l Props., Inc.*, 338 So. 2d 13, 12, 16 (Fla. 1976) (*quoting Hughes*, 389 U.S. at 293, recognizing that "the ancient common law relating to accretion and reliction prevails in Florida," and ruling that a Florida statute which fixed a "specific and permanent boundar[y]" was unconstitutional).

Additionally, the court cited authority noting a *private property owner's* right to reclaim beach property destroyed through an avulsive event for the proposition that the *public* could "restore *its* shoreline" after an avulsive event had engulfed much of the shore. *Walton County*, 998 So. 2d at 1117 (emphasis added). Under the cited authority, however, when a private property owner did not reclaim his property in a reasonable amount of time, the submerged property became property of the state. *See id.* (*quoting* 1 Henry Philip Farnham, *The Law of Waters and Water Rights* § 74, at 331 (1904)) ("If a portion of the land of the [littoral] owner is suddenly engulfed, and the former boundary can be determined or the land reclaimed within a reasonable time, he does not lose his title to it."). Contrary to the court's opinion, the public never had a right to restore engulfed shoreline because if the land was not restored, the State would still hold title to the shoreline up to the MHWL and the littoral property owner would be the only one who had lost property.

Second, the court addressed the right to maintain contact with the water, redefining this right as ancillary to the right of access. *Id.* at 1124. The judicial and legislative branches in Florida had never before defined the right to contact with the water in this manner, however. *See Walton County*, 998 So. 2d at 1124 (Wells, J., dissenting) ("Our common law, statutes, and Constitution indicate that the right of contact with the water is neither 'independent of,' nor 'ancillary to,' . . . littoral property, its ownership, and

associated protected rights."). Rather, prior Florida case law holds the right to contact with the water is a foundational right on which all other littoral property rights depend. *Id.* at 1122-24 (Wells, J., dissenting). Other cases support the right to maintain contact with the water is tied to the right to exclusive access to the water over one's own property. *Thiesen v. Gulf, Fla. & Ala. Ry. Co.*, 78 So. 491, 507 (Fla. 1918) (noting "[t]he right of *access to the property* over the waters" as a principal reason that many riparian owners purchase their properties (emphasis added)); *Bd. of Trs. v. Medeira Beach Nominee, Inc.*, 272 So. 2d 209, 214 (Fla. Dist. Ct. App. 1973) (noting that riparian owners "have the exclusive right of access over their own property to the water" (citation omitted)). Even if Florida statutory law is capable of preserving constitutional rights, this right of exclusive access is clearly not preserved in Florida Statutes Chapter 161 ("Act") if that statute can be read to permit littoral property's contact with the MHWL to be severed. *See Walton County*, 998 So. 2d at 1119-20 (noting that "the renourished beach may be wider than the typical foreshore," and thus, may create a stretch of public land between the MHWL and the ECL, the private property owner's new boundary under Fla. Stat. Ann. §§ 161.151(3), 161.161(3), and 161.181 (2009)).

Last, the court reasoned that the Act is constitutional because it "benefits upland owners by restoring lost beach, by protecting their property from future storm damage and erosion, . . . by preserving their littoral rights to use and view . . . [and] by

protecting their littoral right of access to the water." *Walton County*, 998 So. 2d at 1120. Such an argument is tantamount to claiming that an act which takes storm-damaged front lawns for use as public picnic areas without compensation is constitutional because it benefits the former property owner by restoring storm-damaged property, relieving the property owner of the responsibility of mowing his lawn, and preserving the property owner's rights to access the road and to view and use his lawn in common with the rest of the public. In both cases, the "benefits" described do not outweigh the harms of taking the exclusive right to use property from one owner and conveying it to the public.

Every property must be maintained, and the removal of the maintenance burden cannot outweigh the property owner's pain at knowing that the property is no longer exclusively his. A law cannot be constitutional simply because it could be said to "benefit" the one who claims injury, and it is disingenuous for the court to avert attention from the injuries brought before it to the rights the law did not infringe or the "benefits" the law could provide. The extent to which a taking benefits a property owner may be relevant when determining the amount of compensation due, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 437-38 n.15 (1982) (stating that the possibility "§ 828 'likely increases both the building's resale value and its attractiveness on the rental market' . . . may . . . be relevant to the amount of compensation due"), but it does not transform a

taking into a non-taking. Moreover, at least three of the "benefits" listed by the court are not really benefits at all. Instead, the rights to use, view, and access were rights the property owners held before passage of the Act, and the right to access was actually diminished by the court's decision which removed the supposed "ancillary" right of contact with the MHWL.

The court recognized the historical guarantees of the littoral rights to accretion and to maintain contact with the water, but made every effort to diminish and trivialize them in order to avoid enforcement and to rationalize Florida's beach restoration project. The tortured logic of the court's opinion can only be the result of its desire to place the public policy pretense of beach restoration (the conversion of private beaches to public beaches) before the rights of private property owners. *See Walton County*, 998 So. 2d at 1121 (Lewis, J., dissenting).

B. The Requirement of Proving Customary Use Before Disregarding Trespass Law and Property Rights Is Well-Established.

Common law is clear that the public has no rights in private beach property except those which a court establishes.[14] The Attorney General of Florida

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[14] Neither prescription nor dedication are applicable in the present case because the public has not used the land exclusively or adversely and the private property owner has not

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stated that the nature and extent of any public right to use the dry sand area of private property arises only to the extent such is "ancient, reasonable, without interruption, and free from dispute," all of which "is a mixed question of law and fact that must be resolved judicially." 2002 Fla. AG LEXIS 81, 13-14 (2002). The "doctrine requires the courts to ascertain in each case the degree of customary and ancient use the beach has been subjected to. . . ." *Id.* at 14. "[U]ntil a court establishes a 'customary right of use' by the public in [privately-owned] real property, the fee owners thereof may make complaints of trespass to local law enforcement officers as they occur." *Id.* at 15.

In *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994), Justices Scalia and O'Connor recognized that permitting the public to use private beach property without first establishing the public's customary use of that private property was a taking without just compensation. *Id.* at 1212 (Scalia, J., dissenting). At least three different states, including Florida, acknowledge the doctrine of customary use "to afford the [public] rights in beach property." *City of Daytona Beach v. Tona-Rama*, 294 So. 2d 73, 78 (Fla. 1974). Florida first recognized the customary use doctrine in 1974, *see id.*, and as late as 2007, the Florida District Court of Appeals applied the doctrine to analyze the

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"expressed 'a present intention to appropriate his lands to public use.'" *See Trepanier*, 965 So. 2d at 284-85.

extent of public rights to use privately-owned beach property. *Trepanier v. County of Volusia*, 965 So. 2d 276, 286-93 (Fla. Dist. Ct. App. 2007). In Florida, the doctrine of customary use is well-established law for determining the extent of public rights to use private property.

Furthermore, the doctrine of customary use must be determined for each locality individually. While the customary use doctrine can be used to deprive private property owners of their exclusive rights to enjoy the dry sand portions of the beach, it must not be applied too broadly. *Stevens*, 510 U.S. at 1212 n.5 (Scalia, J., dissenting) (noting that customs apply to "particular districts" rather than "all property 'similarly situated'"). Proving the public has customarily used private property at one Florida beach does not mean the public has customarily used private property on every Florida beach. *See Trepanier*, 965 So. 2d at 289 (stating that "the acquisition of a right to use private property by custom is intensely local" and must be proved in each particular geographical area); *County of Volusia v. Reynolds*, 659 So. 2d 1186, 1190 (Fla. Dist. Ct. App. 1995) (stating the customary use "doctrine requires the courts to ascertain in each case the degree of customary and ancient use the beach has been subjected to. . . ."). Because of this, private property owners "must be afforded an opportunity to make out their constitutional claim" in each locale "by demonstrating that the asserted custom, is pretextual." *Stevens*, 510 U.S. at 1214 (Scalia, J., dissenting).

C. The Governments Have Not Met The Elements For Establishing Customary Use in This Case.

In *Tona-Rama*, the Florida Supreme Court stated that, for the doctrine of customary use to apply, the public's use of private beach property must be "ancient, reasonable, without interruption and free from dispute." *Tona-Rama*, 294 So. 2d at 78. The customary use "doctrine requires the courts to ascertain in each case the degree of customary and ancient use the beach has been subjected to and . . . to balance whether the proposed use of the land by the fee owners will interfere with such use enjoyed by the public in the past." *Reynolds*, 659 So. 2d at 1190. "This right of customary use of the dry sand area of the beaches by the public does not create any interest in the land itself," but permits the public to use private land for the purposes to which they have become accustomed. *Tona-Rama*, 294 So. 2d at 78.

In the present case, the County and City have not made any efforts to prove the public acquired rights to use private beach properties by custom. Rather, the local governments assumed this alleged "right" to use the private beaches based on custom, by-passing the adjudicatory process. This is because customs in locations differ, and thus, customary use rights will also differ. *Trepanier*, 965 So. 2d at 289. Thus until a court establishes the ancient and reasonable public uses on private beach properties, Florida governments must protect the owners'

exclusive right to use their properties and to exclude others. 2002 Fla. AG LEXIS 81, 15 (2002).

The court articulated no justification for failing to follow established customary use requirements other than to circumvent the governments' duty to protect private property rights. The court was not forced to decide between upholding private beach property owners' rights and permitting the Florida government to pursue policies it deemed to be of public importance. If the court had struck down the governments' application of the Act, it would not have destroyed the Florida government's ability to pursue its public policy interests. "If the Court construed the Act in a manner that did *NOT* sever . . . littoral property from the water," and that paid just compensation for any invasions of private property, "the Act [could] be applied constitutionally," but the governments' present application of the Act destroys property rights guaranteed by the U.S. and Florida Constitutions. *See Walton County*, 998 So. 2d at 1126 (Lewis, J., dissenting). By failing to uphold private property rights, the court dealt a great blow to rights which are of "critical and . . . fundamental importance." *Id.* at 1128 (Lewis, J., dissenting). "The rights inherent in private-property ownership are at the foundation of this nation and this State." *Id.* (Lewis, J., dissenting).

The court recognized in the *Medeira* case, "quieting title in the state [to accreted land] will little benefit the state while causing great harm to . . . riparians." *Medeira*, 272 So. 2d at 214. There is "no

reason for causing such a result." *Id.* "[R]estoration and renourishment in the form of filling currently submerged property to separate . . . littoral property from the resulting MHWL simply violates all prior notions of waterfront property rights in Florida." *Walton County*, 998 So. 2d at 1126 (Lewis, J., dissenting). The decision of the court deals a great blow to the property rights, which our U.S. Constitution and the Florida Constitution protect for the sole purpose of upholding state programs and policies which rely on pretense to circumvent private property rights.

II. BY CIRCUMVENTING THE CUSTOMARY USE REQUIREMENT, THE COURT HAS EFFECTED A JUDICIAL TAKING WITHOUT JUST COMPENSATION IN VIOLATION OF PRIVATE BEACH PROPERTY OWNERS' DUE PROCESS RIGHTS.

A. Beach Owners' Property Rights Are Real and Not Illusory.

This Court need not interpret state statute, nor follow the interpretation of the state Supreme Court, to establish the well-founded principle that private beach property is entitled to full constitutional protection.

"[A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken

never existed at all." *Hughes*, 389 U.S. at 296-97 (Stewart, J., concurring). In the present case, the Supreme Court of Florida permitted the State of Florida to take private property without compensation. This right to exclusive possession of private beach property is real and not illusory, unless a court recognizes a public customary use of the property.

The Florida Constitution states, only title to the portion of the beach "below [the MHWL] is held by the state . . . in trust for all the people" FLA. CONST. art. X, § 11; the MHWL "along the shores of land immediately bordering on navigable waters is recognized and declared to be the boundary between the foreshore owned by the state . . . and upland subject to private ownership," Fla. Stat. Ann. § 177.28(1) (2009). The court noted the State only owns the shore space between "high and low water marks . . . for the purpose of navigation and other public uses," if "such waters as by reason of their size, depth and other conditions are in fact capable of navigation for useful public purposes." *Clement v. Watson*, 58 So. 25, 26 (Fla. 1912). Thus, in *Clement*, the court ruled a cove adjacent to the New River Sound was private property, and as such, the owner had a right to exclude the public from fishing in the cove. *Id.* at 27.

On the other hand, the area above the MHWL is subject to private ownership. *Trepanier*, 965 So. 2d at 284. Because this dry sand area is not navigable or useful to improve navigation, it is not automatically the property of the government subject to public use.

See Clement, 58 So. at 26. Florida statutory law establishes the MHWL as the boundary for private beach property. Fla. Stat. Ann. § 177.28(1) (2009). The law affirmatively recognizes the doctrines of "accretion, reliction, erosion, [and] avulsion" as part of Florida's common law. Fla. Stat. Ann. § 177.28(2) (2009). Private beach property owners clearly have exclusive rights in their properties extending to the MHWL, including all littoral rights incident to such properties.

B. The Taking of Private Beach Properties and Property Rights for Public Use Without Just Compensation Is a Direct Violation of Property Owners' Rights.

The harm to private property rights in the present case is not merely the "incidental consequence of the lawful and proper exercise of a governmental power." *See Scranton v. Wheeler*, 179 U.S. 141, 157 (1900) (citation omitted). Rather, the State has taken a portion of private properties and subjected them to trespass by the public, Fla. Stat. Ann. § 161.191(1) (2009) (noting the establishment of a fixed ECL boundary to replace the flexible MHWL boundary), and the government's forcible entry onto their properties to place thousands of tons of sand as a part of its beach restoration. Moreover, the legislature has seized private property owners' littoral rights to accretion and contact with the water. *See* Fla. Stat. Ann. § 161.191 (2009). These two sets of property rights will be discussed in turn.

i. Private beach property owners have the right to just compensation when their properties are taken for public use.

The Fifth Amendment to the United States Constitution declares that private property shall not "be taken for public use, without just compensation." U.S. CONST. amend. V. In addition, the Florida Constitution reads, "No private property shall be taken except for a public purpose and with full compensation therefore paid to each owner. . . ." FLA. CONST. art. X, § 6(a). The "just compensation" which the Constitution requires "is to be measured by the loss caused to [the owner] by the appropriation. He is entitled to receive the value of what he has been deprived of. . . . To award him less would be unjust to him. . . ." *Bauman v. Ross*, 167 U.S. 548, 574 (1897). Thus, if the court finds the State has taken private properties, the owners must be justly compensated.

The permanent physical occupation of property is always a taking. *Loretto*, 458 U.S. at 434-35. It deprives the owner of the power to exclude others, which power "has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." *Id.* at 435 (citations omitted). The government's grant of permission to the public to trespass upon private properties is an invasion of their exclusive property rights. Fla. Stat. Ann. § 810.09(1)(a) (2009) states, "[a] person who, without being authorized, licensed, or invited, willfully enters upon or remains in any property . . . [a]s to which

notice against entering or remaining is given . . . commits the offense of trespass on property. . . ." Additionally, private property owners have littoral rights to protect their property from trespass: "Among the common-law rights of those who own land bordering on navigable waters . . . are . . . the right to protect the abutting property from trespass and from injury by the improper use of the water for navigation or other purposes. . . ." 1985 Fla. AG LEXIS 58, 13 (1985) (citation omitted). The physical occupation of private properties by members of the public is a taking for which the owners deserve compensation.

Additionally, fixed boundaries are both permanent and physical. The sand deposited onto private properties physically occupies them in a permanent way since the Act gives the government the responsibility of maintaining the sand on the beaches. The State's redefinition of private property boundaries also constitutes a taking by permanently depriving the owners of their right to accretions and to hold all land between the landward boundaries of their properties and the MHWL without unauthorized interference.

Case law also states "it remains true that where real estate is actually invaded by superinduced additions of . . . sand . . . so as to effectually destroy or impair its usefulness, it is a taking within the meaning of the Constitution. . . ." *District of Columbia v. Prospect Hill Cemetery*, 5 App. D.C. 497, 516 (D.C. Cir. 1895). Moreover, "[t]he making of . . . improvements necessarily involves the taking of the

property." *United States v. Great Falls Mfg. Co.*, 112 U.S. 645, 656 (1884). Whether superinduced additions are interpreted to be destructive or improvements, the State does not have the right to place such additions onto property without the owner's consent or the payment of just compensation for the rights taken.

ii. Private beach property owners have the right to just compensation when their littoral rights are taken.

"[R]iparian rights are legal rights," *City of Eustis v. Firster*, 113 So. 2d 260, 261 (Fla. Dist. Ct. App. 1959) (citations omitted), which "exist in Florida as a matter of constitutional rights and property law and are not dependent on" statutes, *Feller v. Eau Gallie Yacht Basin, Inc.*, 397 So. 2d 1155, 1157 (Fla. Dist. Ct. App. 1981).[15] "[L]ittoral rights of owners of lands are derived from the common law as modified by statute and are property rights 'of a qualified or restricted nature of which the owner ordinarily cannot be deprived without his consent or without proper compensation.'" 1985 Fla. AG LEXIS 58, 16-17 (1985) (citations omitted) (also stating "the provisions of [FLA. CONST. art. X, § 6(a)] would appear to directly affect any . . . action by the municipality" to repeal an

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[15] Cases and statutes have used the word "riparian" to describe all waterfront property, whether littoral or riparian. *Walton County*, 998 So. 2d at 1105 n.3.

exemption for littoral owners along public beaches and would "require that full compensation be paid for the taking of such rights."); 1990 Fla. AG LEXIS 37, 15 (1990) ("[R]iparian rights are property rights that may not be taken without just compensation." (citations omitted)). In addition, the rights of "littoral landowners are at times greater than those of the general public." 1985 Fla. AG LEXIS 58, 15 (1985); *see also Medeira*, 272 So. 2d at 214 ("[E]ven beachfront property owners are members of the public. Their status as riparian owners, however, has historically entitled them to greater rights, with respect to the waters which border their land, than inure to the public generally.").

Moreover, the rights to accretion and to maintain littoral property's contact with the MHWL are protected littoral rights. "[L]ittoral property rights . . . include" not only "the right to use the water shared by the public," but also "the following vested rights: (1) the right of access to the water, including the right to have the property's contact with the water remain intact, . . . and (4) the right to receive accretions and relictions to the property." *Sand Key*, 512 So. 2d at 936. Littoral property owners "have the exclusive right of access over their own property to the water." *Medeira*, 272 So. 2d at 214 (citations omitted). Additionally, in *Fla. Nat'l Props., Inc.*, 338 So. 2d at 17, the Florida Supreme Court quoted the reasoning of the Florida Court of Appeals that:

> an owner of land bounded by the ordinary [MHWL] is vested with certain riparian

> rights, including the right to title to such additional abutting soil or land which may be gradually formed or uncovered by the processes of accretion or reliction, which right cannot be taken by the State without payment of just compensation.

The court went on to rule that a statute fixing the boundary line between sovereign lands and riparian uplands was unconstitutional under both the Federal and State Constitutions because it eliminated this riparian right to accretion without just compensation. *Id.* at 17-18. Thus, any governmental action which denies private property owners their littoral rights to accretion and to maintain their properties' contact with the MHWL is a taking for which compensation is due.

III. THE COUNTY'S AND CITY'S DISREGARD OF TRESPASS LAWS VIOLATES PRIVATE PROPERTY OWNERS' RIGHTS TO EQUAL PROTECTION OF THE LAW.

The local governments' non-enforcement of trespass laws raises equal protection concerns. One of the hallmarks of constitutionally protected property rights is the right to exclude. The Equal Protection Clause of the Fourteenth Amendment reads, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Similarly, the Florida Constitution states, "All natural persons . . . are equal before the law and have inalienable rights, among

which are the right . . . to acquire, possess, and protect property. . . ." FLA. CONST. art. I, § 2.

In order to prove a violation of the Fourteenth Amendment's Equal Protection Clause, one must prove that the state has not treated similarly situated persons similarly. *See Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).

> Though the law . . . be fair on its face, and impartial in appearance, . . . if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.

Id.

In the present case, the City is enforcing trespass laws unequally, violating property owners' rights. The City has acted with "clear and intentional discrimination" by directing the Sheriff not to enforce state trespass laws on the City's beach property up to 25 feet from the MHWL, *see, e.g., Gundling v. Chicago*, 177 U.S. 183, 186 (1900), but giving no such orders in regard to any other properties in the City. Through this decision, the City is deliberately treating similarly situated persons differently.

In order to defeat an Equal Protection claim, the City must show that the facts may be reasonably "conceived to justify" discriminatory state action. *See*

Metro. Cas. Ins. Co. v. Brownell, 294 U.S. 580, 584 (1935). There is no state of facts that could reasonably be conceived to justify an uncompensated denial of constitutionally-protected property rights, however. The condoned trespass on private property is a grave deprivation of constitutional rights.

> [A]n owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property. . . . [S]uch an occupation is qualitatively more severe than a regulation of the use of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion.

Loretto, 458 U.S. at 436. If a regulation of the use of property can require just compensation under the Fifth Amendment, *see Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537-40 (2005), then the Constitution protects property owners from trespasses onto property which are "qualitatively more severe" than property regulations. *See Loretto*, 458 U.S. at 436. The City has specifically chosen to make its trespass laws inapplicable to a 25-foot-wide portion of private properties, effectively giving the public an easement in private beach properties and depriving the owners of the exclusive use of their properties without compensation. Since the government has treated the City's beach property owners differently than others with respect to the enforcement of its laws, the City

has violated the private property owners' right to equal protection of the law.

CONCLUSION

For the foregoing reasons, SOB and SLF respectfully urge this Court to reverse the opinion of the Florida Supreme Court and rule in favor of Petitioners, Stop the Beach Renourishment, Inc., and in favor of a restoration of the constitutionally protected and predictable property rights on which this nation was founded and on which its citizens depend.

Respectfully submitted,

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AMICUS CURIAE BRIEF

605-4ZK8YV (13)

No. 08-1151

Supreme Court, U.S.
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In The

Supreme Court of the United States

STOP THE BEACH RENOURISHMENT, INC.,

Petitioner,

v.

FLORIDA DEP'T OF ENVIRONMENTAL PROTECTION, ET AL.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Florida

BRIEF OF *AMICUS CURIAE* SAVE OUR SHORELINE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

AMICUS CURIAE WILL ADDRESS THE FOLLOWING QUESTION:

> THE FLORIDA SUPREME COURT INVOKED "NONEXISTENT RULES OF STATE SUBSTANTIVE LAW" TO REVERSE 100 YEARS OF UNIFORM HOLDINGS THAT LITTORAL RIGHTS ARE CONSTITUTIONALLY PROTECTED. IN DOING SO, DID THE FLORIDA COURT'S DECISION CAUSE A "JUDICIAL TAKING" PROSCRIBED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae[1] Save Our Shoreline ("SOS") is a Michigan nonprofit membership corporation comprised of approximately 3,000 families who own a home or cottage, or live, along Michigan's 3,288 miles of Great Lakes shoreline. The organization's mission is to "preserve and maintain riparian rights, including the right to maintain safe recreational beaches and waterfront areas, both public and private; and to preserve and maintain a proper balance for the coexistence of man and nature upon and near waterfront property." *See* <www.saveourshoreline.org> (viewed August 17, 2009). The organization was formed in 2001 in response to low water levels and a new and sudden assertion of government control over the newly exposed beaches. Such government claims were based on numerous legal theories under state and federal law which SOS investigated and found to be of questionable merit. For example, the United States Army Corps of Engineers Detroit District asserted that the movement of sand involved in beach grooming violated the Clean Water Act. So when a similar issue presented itself before this Court in *Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 536 U.S. 903, 122 S. Ct. 2355 (mem), 153

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[1] *Amicus Curiae* submits this brief supporting petitioners; both parties have consented to its filing. *See* Rule 37.3. No counsel for either party authored this brief *amicus curiae* either in whole or in part. Furthermore, no persons other than *amicus curiae* contributed financially to the preparation of this brief.

L. Ed. 2d 178 (2002), SOS filed an *amicus curiae* brief alerting the Court that a finding that deep plowing of ranchland violates the Clean Water Act might also bring beach grooming within the Act. In other federal litigation, SOS supported a retired couple alleged to have violated the Clean Water Act by grooming their beach (in that case to remove and prevent invasive, non-native phragmites plants), and secured dismissal and a decision curtailing Corps of Engineers' jurisdiction. *See U.S. v. Marion L. Kincaid Trust*, 463 F. Supp. 680 (E. D. Mich. 2006).

Most important to the litigation before this Court, SOS supported cottage owners against claims that the State of Michigan owned their beach. *See Glass v. Goeckel*, 683 N.W.2d 719, 262 Mich. App. 29 (2004), *rev'd and remanded*, *Glass v. Goeckel*, 703 N.W.2d 58, 473 Mich. 667 (2005). In that case, the Michigan Supreme Court declined to find that the lakeshore was publicly owned. But in a monumental shift, the Court ignored prior law placing exclusive use of the shore with the riparian owner. Instead, the Michigan Court created a "public trust" upon the dry lakeshore which included the public's right to walk on the dry shore. Despite claims that the decision effected a judicial taking, this Court refused the landowner's Petition for Writ of Certiorari. *Goeckel v. Glass*, 546 U.S. 1174, 126 S. Ct. 1340, 164 L. Ed. 2d 54 (2006).

This Court's decision in the case at bar may well determine the fate of the private owners of Michigan's 3,288 miles of Great Lakes shoreline, who for most of

the 160 year period before *Glass v. Goeckel* enjoyed the rights of exclusive use of the bank and shore accorded them under the clear, unambiguous, and longstanding decisions of the Michigan Supreme Court and the actions of the executive and legislative branches of Michigan government.

SUMMARY OF THE ARGUMENT

Now that the nation's coastlines have been substantially developed under caselaw in many states firmly putting the shores in private ownership, states seek to change the rules, and convert these once private shores to the public domain. The states increasingly do this using their courts, which abuse common law principles to simply deny that private rights ever existed. Florida's example, presented in this case, is only the most recent. Four years ago, the Michigan courts employed this strategy to abruptly change Michigan law, deny exclusive-use rights to a riparian owner, and grant new public rights to use the shore. By using this method, the judiciary conveniently acquires new rights for the state without compensating the owner. But through this method, the judiciary improvidently makes policy choices for its citizens, while at the same time avoiding debate – or even input – about the propriety of its choices. The approach used by the states to shift such substantial rights among their citizens is not good government,

but more importantly, it violates constitutional protections of private property.

ARGUMENT

Our nation's private shorelines are extremely valuable properties in American society. According to the American Shore and Beach Preservation Association, citing the U.S. Census Bureau, 54 percent of our nation's population lives within 50 miles of a coast. *See* <http://www.asbpa.org/publications/fact_sheets/pubs_fs_myth_reality.htm> (viewed August 18, 2009).

A U.S. Army Corps of Engineers researcher defined the importance of beaches in this way:

> Travel and tourism is America's leading industry, employer, and earner of foreign exchange; and beaches are America's leading tourist destination.

Houston, James, "The Economic Value of Beaches – a 2008 Update." <http://www.marloweco.com/files/Economic_Value_of_Beaches_(2008).pdf.> (viewed August 4, 2009). The societal value focused on beaches in turn raises the economic value of waterfront property, which of course leads to investment in vast sums by private owners. Waterfront property represents "some of the most expensive real estate in America." Slade, *et al.*, "Putting the Public Trust Doctrine to Work" (Coastal States Organization 1997).

Given the value of our nation's coastal real estate, it is no surprise that the beaches have become the battleground between state and citizen for testing our Constitution's protection of private property. The battle, however, is not new. What is new is the states' success in utilizing the courts themselves – the last peaceful defense against governmental trouncing of private rights – to seize control of this highly prized property.

Petitioner noted in its Petition for a Writ of Certiorari that "[s]ince 1994, this Court has been presented with no less than 15 petitions for writs of certiorari asserting a judicial taking." Petition, p. 31. Michigan's *Goeckel v. Glass*, *supra* is certainly a worthy candidate for that list. In that case, in the shadow of a clamoring press, a 5-2 majority of the Michigan Supreme Court ignored the long-standing "exclusive use" holding of *Hilt v. Weber*, 233 N.W. 159, 252 Mich. 198 (1930), imposed a "public trust" along the dry shore, and created a public right of beach-walking along the shore.

As explained in the *Hilt* decision, Michigan decisions had long observed that riparians own, and have the right of exclusive use, to the water's edge. *Id.* at 222. That precedent was briefly upset by *Kavanaugh v. Rabior*, 192 N.W. 623, 222 Mich. 68 (1923) and *Kavanaugh v. Baird*, 217 N.W. 2, 241 Mich. 240 (1928), which for the first time placed the boundary at the "meander line." The *Hilt* court expressly overruled the "*Kavanaugh* cases" and re-established the boundary at the water's edge, consistent with

earlier cases such as *People v. Warner*, 74 N.W. 705, 116 Mich. 228 (1898).

In doing so, the *Hilt* court acknowledged the pressures on the court to appropriate the beaches to public use:

> With much vigor and some temperature, the loss to the State of financial and recreational benefit has been urged as a reason for sustaining the *Kavanaugh* doctrine. It is pointed out that public control of the lake shores is necessary to insure opportunity for pleasure and health of the citizens in vacation time, to work out the definite program to attract tourists begun by the State and promising financial gain to its residents, and to conserve natural advantages for coming generations. The movement is most laudable and its benefits most desirable. The State should provide proper parks and playgrounds and camping sites and other instrumentalities for its citizens to enjoy the benefits of nature. But to do this, the State has authority to acquire land by gift, negotiation, or, if necessary, condemnation. There is no duty, power, or function of the State, whatever its claimed or real benefits, which will justify it in taking private property without compensation. The State must be honest.

Hilt at 224. The *Hilt* court instead sided with the private shore owner, a policy choice which aided "development of the lake shores," and allowed the state

"to levy and collect taxes on the relicted land." *Id.* at 227. The *Hilt* court therefore affirmed in 1930 that the private owner "has full and exclusive use of the relicted land" representing the shore above the water's edge. *Id.*

For 75 years thereafter, the *Hilt* decision was followed by Michigan courts. *See, e.g., Schofield v. Dingman*, 247 N.W. 67, 261 Mich. 611 (1933) (riparian owners on Lake Michigan generally enjoy exclusive rights to beach); *Meridian Twp. v. Palmer*, 273 N.W. 277, 279 Mich. 586 (1937) (citing *Hilt's* exclusive use rule and applying it to inland lake); *Thies v. Howland*, 380 N.W. 463, 424 Mich. 282 (1985) (citing *Hilt's* exclusive use rule and applying it to inland lake); *Peterman v. DNR*, 521 N.W.2d 499, 446 Mich. 177 (1994) (finding that riparian rights include "exclusive use of the bank and shore"; that the right of exclusion is "one of the essential elements of property in land"; and affirming damage award against state for unnecessary destruction of neighboring beach, including beach below "ordinary high water mark," in constructing boat ramp). Moreover, the state recognized the riparian's rights of exclusive use to the shore. *See, e.g.*, OAG 1977-1978, No. 5327 (July 6, 1978) ("The riparian owner therefore has trespass control to the water's edge.").

The exclusive use rights that Michigan Great Lakes Shoreline Owners long enjoyed suddenly changed in *Glass v. Goeckel*, *supra*. In that case, the Michigan Court of Appeals reviewed Michigan law and concluded that because riparians "have the right

to the exclusive use and enjoyment of their land to the water's edge," they may exclude trespassers. *Glass v. Goeckel*, 683 N.W.2d 719, 262 Mich. App. 29 (2004). But in reversing, the Michigan Supreme Court simply ignored both the clear holding of the *Hilt* court 75 years earlier, and the longstanding position of the state's chief law enforcement officer, its attorney general. Instead, it created out of whole cloth "the [public's] right to walk along the shore of Lake Huron on land lakeward of the ordinary high water mark." *Id.* at 675. In his vigorous and poignant dissent, Justice Markman recognized that this holding altered "the longstanding status quo in our state concerning the competing rights of the public and lakefront property owners" that existed "over 160 years and probably even earlier." *Id.* at 709, 713. The Goeckels appealed to this Court complaining of a judicial taking, but this Court denied certiorari. *Goeckel v. Glass*, *supra*.

Commentators have argued that *Glass* plainly effected an unconstitutional taking. *See, e.g.*, Creative Judicial Misunderstanding: Misapplication of the Public Trust Doctrine in Michigan, 58 Hastings L.J. 1095 (2007). The result-oriented *Glass* decision clearly acknowledged its belief that it was immune from a judicial taking claim, citing this Court's decision in *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475, 108 S. Ct. 791, 98 L. Ed. 2d 877 (1988) that "the individual states have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see

fit." *Glass*, *supra* at 703. Of course, the question here is what the state can do *after* it has long ago defined those limits.

It is clear that many states, through their highest courts, have found the common law a convenient vehicle for confiscating private beach rights without paying just compensation. Spurred on by this Court's decision in *Phillips Petroleum, supra*, and despite the public trust doctrine's "disuse and neglect," the Coastal States Organization, now comprised of the governments of 35 coastal states, has published a treatise outlining how they can utilize the doctrine to expand public rights over private property. *See* Slade *et al.*, "Putting the Public Trust Doctrine to Work" pp. xiii and 9 (Coastal States Organization 1997). The authors are unapologetic about the benefit of this approach as a "management tool for coastal resources":

> When acting under the authority of the Public Trust Doctrine, however, the state and state agencies are in a strong position to defend against "takings" claims.

Id. at 9. They are also clear about other benefits of the doctrine: it allows "the State to manage these resources as a property owner without having to exercise either regulatory police powers or its powers of eminent domain." *Id.* at 8. The states have thus been clear about their coordinated approach to attacking shoreline property rights: they will take a little used doctrine and offer it as a means to

confiscate private rights and avoid takings claims. Michigan's *Glass v. Goeckel*, *supra* is but one example of how the public trust doctrine was used by a willing court to create new public rights at the expense of private owners without precedent. Perhaps the most far reaching example is *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 369, 95 N.J. 306 (1984), where the Supreme Court of New Jersey created a public "right to cross private land and to use a portion of the dry sand" to "swim and bathe," among other things.

At this writing, the new assault on private beach rights is being played out in a widely publicized Ohio case, where the state has disregarded longstanding prior caselaw and asserted public ownership of the shore based on the public trust doctrine. It has required riparians to "lease" from it the right to maintain structures on the dry shore. *See State of Ohio Ex. Rel. Robert Merrill, Trustee, et al. v. State of Ohio, Department of Natural Resources, et al.*, Ohio Court of Appeals Case No. 2008-L-008, viewed at <www.ohiolakefrontgroup.com> (viewed August 17, 2009). That case will almost certainly make its way to the Ohio Supreme Court, and then be presented to this court for review. The insatiable government appetite for control over private shores is sure to continue so long as this Court continues a "hands off" response to judicial confiscation of America's private beaches.

Save Our Shoreline submits that the approach used is also poor governmental policy. Litigants in a

court of law in property cases are especially accustomed to arguing issues of *stare decisis* as opposed to policy, especially when prior law is clear and well-established, such as in *Glass v. Goeckel, supra.* Simply put, litigants in property cases do not anticipate that a court will effect a sudden change in the law governing private property rights. As such, a court that suddenly deviates from the law and imposes its own views does so without sufficient input about the ramifications of its actions. If control of the lakeshores must necessarily be suddenly shifted from private owners to government, that issue should be fully debated in the open. When a court instead focuses its efforts on convincing parties and the public that it has not changed property rights when in fact it has, the proper debate never occurs.

CONCLUSION

The concept of judicial taking is often discussed as a possible tool for this Court to curb abuse by state courts which might use their power to develop the common law as a means to confiscate private property for public use. Private ownership of beaches and shoreline property are under attack by state governments unwilling to settle for regulatory control under the police power, and the protections such an approach provides private owners. As evidenced by cases in New Jersey, Michigan, and now Florida, among others, state courts continue to disregard their prior decisions and shift control of such lands to the

states, some without any discussion of why public policy favors such a move. With property law being a creature of the common law, the constitutional protection of private property will mean little if state courts can change the common law of property whenever they deem a public need. This court should find that the Florida approach in this case violates the Fifth and Fourteenth Amendments to the U.S. Constitution.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 08-1151

In the Supreme Court of the United States

STOP THE BEACH RENOURISHMENT, INC.,
Petitioner,

v.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND, WALTON COUNTY, and CITY OF DESTIN,
Respondents.

ON WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

BRIEF OF SURFRIDER FOUNDATION AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF SURFRIDER FOUNDATION AS *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, Surfrider Foundation ("Surfrider") submits this *amicus curiae* brief in support of Respondents Florida Department of Environmental Protection, The Board of Trustees of the Internal Improvement Trust Fund, Walton County, and the City of Destin.[1]

Surfrider is a nonprofit grassroots environmental organization dedicated to the protection and enjoyment of the world's oceans and beaches. Surfrider was founded in 1984 by a group of environmentally-minded surfers in Malibu, California to preserve the natural diversity and ecological integrity of the coastal environment and to promote the right of low-impact, free, and open access to the world's oceans, waves, and beaches for all people. Surfrider's over 50,000 members represent a broad cross-section of surfers, beach users, oceanfront landowners, and business owners in Florida and across the United States. Surfrider has over 3500 members in Florida, including 29 members in Florida who regularly access the property in dispute in this case in Walton County and Destin, and two members who own property within the boundaries of the project at issue in this case.

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[1] Surfrider confirms that (i) no person other than Surfrider, its members, or its counsel made a monetary contribution to the preparation or submission of this brief, (ii) no counsel for any party authored any part of this brief, and (iii) no party or counsel contributed money intended to fund the preparation or submission of this brief. The parties have filed blanket waivers consenting to the filing of amicus briefs.

Surfrider has represented the public interest in litigation before both state and federal courts across the country. Surfrider has also participated as *amicus curiae* in several precedent-setting litigation proceedings concerning environmental stewardship and beach access. Surfrider believes that its perspective as an organization that represents ocean-front landowners as well as members of the public who access beaches throughout Florida and across the country will assist the Court in deciding the significant issues presented in this case.

SUMMARY OF ARGUMENT

The Florida Department of Environmental Protection ("DEP") acted pursuant to its legislatively-designated role under Chapter 161 of the Florida Statutes to preserve critically eroded beaches in Florida. The DEP protected a critically eroded beach, and protected the public's interest in accessing Florida's beaches and waters. Petitioner Stop the Beach Renourishment, Inc.'s ("Petitioner") challenge to the constitutionality of the DEP's action fails for three reasons.

First, the Beach and Shore Preservation Act (the "Act") is facially constitutional. It provides reasonable and appropriate measures to enable the State of Florida to discharge its obligations to the citizens of Florida as trustee, under Article X of the Florida Constitution, of the public's rights to the State's lands under navigable waters. Where circumstances require the State to take action to preserve its shorelines through "renourishment" of critically eroded beaches, as occurred here, the Act fully protects private interests by assuring the preservation of long-standing littoral rights and, to the extent any property rights are "taken," by providing just compensation. In short, the Act preserves and protects both public and private interests. Petitioner's case, to the extent it presents a facial challenge to the Act, must fail.

Second, the Act is constitutional as applied here because no private property was taken. Petitioner complains that the State's "renourishment" project took two property rights from the owners of beachfront property. But neither the right of "contact"

with the water nor the rights to any accretions or relictions have been taken here. The property owners still enjoy the right of contact as part of their right of access; and there can be no accretion or reliction rights on a shoreline that is *losing* land through erosion (the basis for "renourishment" in the first place). The State is merely raising sovereign, State-owned land, to which the only future shoreline changes will now be the erosion of the State's property—not the private landowners, who are completely protected, with their property boundaries fully intact. The application of the Act not only did not take property away from them, it protected them from losing more, all at public expense.

Third, Petitioner asks this Court for the first time to endorse a "judicial takings" doctrine. This contradicts nearly 100 years of Supreme Court law. This is also not supported specifically in this case, since the Florida Supreme Court decision is not a "sudden change" in Florida law. Rather, the Supreme Court has applied its own common law, to which deference is applied, in examining a modern response to the constant threat of erosion in Florida. The Florida Supreme Court interpreted the laws of the Florida Legislature and decisions of Florida common law to properly and correctly uphold the constitutionality of the Act. There has been no "judicial taking" here.

ARGUMENT

I. Florida's Beach and Shore Preservation Act On Its Face Does Not Take Littoral Rights Without Just Compensation.

A. The Beach and Shore Preservation Act

Recognizing the critical importance of Florida's beaches, the Florida Legislature enacted in 1961 the Beach and Shore Preservation Act, codified at FLA. STAT. § 161.011 *et seq.* (2009) (the "Beach and Shore Preservation Act" or the "Act"). Under the Act, the Florida Legislature delegated to the Florida DEP the authority to designate beaches as "critically eroded" and, in partnership with affected local governments, to "authorize appropriations to pay up to 75 percent of the actual costs for restoring and renourishing a critically eroded beach." *Id.* § 161.101(1).

When a beach restoration project is commenced under the Act, a survey of the coastline is conducted to determine the mean high water line ("MHWL") for the affected area. *Id.* § 161.141. After the MHWL is established, the Board of Trustees of the Internal Improvement Trust Fund ("Board") then establishes the area of beach to be protected by the project and locates an erosion control line ("ECL"). *Id.* § 161.161(3). In locating the ECL, the Board is "guided by the existing line of mean high water, bearing in mind the requirements of proper engineering in the beach restoration project, the extent to which erosion or avulsion has occurred, and the need to protect existing ownership of as much upland as is reasonably possible." *Id.* § 161.161(5).

After the ECL is recorded, it becomes the fixed property boundary between public lands and upland property during the life of the restoration project. *Id.* § 161.191(1). While the ECL is in effect, the common law no longer operates to "increase or decrease the proportions of any upland property lying landward of such line, either by accretion or erosion or by any other natural or artificial process." *Id.* § 161.191(2). Upon completion of the restoration project and certain other contingencies, the boundary between public lands and upland property reverts to the status quo ante. *Id.* § 161.211 (prescribing revocation of the ECL in the event "renourishment" is not commenced within 2 years, "renourishment" is halted in excess of 6 months, or the authorities do not maintain the "renourished" beach).

B. The Florida Supreme Court Analyzed This Case as a Facial Challenge to the Act.

The Florida Supreme Court analyzed this case as a facial challenge to the Beach and Shore Preservation Act. *See Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1105, 1120–1121 (Fla. 2008) ("[W]e find that the Act, on its face, does not unconstitutionally deprive upland owners of littoral rights without just compensation."). This Court should likewise narrow its review to the question of the Act's facial validity. To do otherwise would require a fact-intensive analysis providing little precedential value. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 (2002) ("Land-use regulations are ubiquitous and most of them impact property values in some tangen-

tial way—often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford."); *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155, 168 (1958) ("Traditionally, we have treated the issue as to whether a particular governmental restriction amounted to a constitutional taking as being a question properly turning upon the particular circumstances of each case."). Therefore, at most, the Court should evaluate only whether the Act is constitutional on its face. For the reasons explained below, it is.[2]

C. The Beach and Shore Preservation Act Is Constitutional on its Face.

As this Court has consistently held, ownership of waterfront property and riparian rights are matters left to the individual states. *See Or. ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378 (1977) ("This Court has consistently held that state law governs issues relating to [riparian lands], like other real property, unless some other principle of federal law requires a different result."); *see also In re Lemco Gypsum, Inc.*, 910 F.2d 784, 789 (11th Cir. 1990) (same); *Ga. Power Co. v. Baker*, 830 F.2d 163, 166 (11th Cir. 1987) (same). The Act does not authorize the taking of private lands, but instead strikes a reasonable balance between public and private interests in critically eroded shoreline in the unique, modern context of beach restoration.

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[2] On this point the Florida Supreme Court was unanimous, the two dissenting justices finding fault only with the application of the Act to the facts presented. Opin. at 38, 53.

First, the Act effectuates Florida's constitutional duty to protect its beaches. FLA. CONST. art. X, § 11 ("The title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, *in trust for all the people.*") (emphasis added); *id.* art. II, § 7(a) ("It shall be the policy of the state to preserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise and for the conservation and protection of natural resources."); *see also White v. Hughes*, 190 So. 446, 449 (Fla. 1939):

> The State holds the fore-shore in trust for its people for the purposes of navigation, fishing and bathing. It is difficult, indeed to imagine a general and public right of fishing in the sea, and from the shore, unaccompanied by a general right to bathe there, and of access thereto over the fore-shore for that purpose. Universal and habitual practice in England and America for many years has established this right .... Small inland streams and lakes, which are not navigable and not subject to the tides, may under certain circumstances become private property to all intents and purposes. But not so the sea, or its shore.

Brickell v. Trammel, 82 So. 221, 226 (Fla. 1919):

> The navigable waters in the State and the lands under such waters, including the shore or spaces between ordinary high and low water marks, are the property of the State or of

> the people of the State in their united or sovereign capacity. Such lands are not held for purposes of sale or conversion into other values, or for reduction into several or individual ownership, but for the use of all the people of the State for purposes of navigation, commerce, fishing, and other useful purposes afforded by the waters thereon.

The Act protects the people's use of "critically eroded" beaches. FLA. STAT. § 161.088 (determining that "beach erosion is a serious menace to the economy and general welfare of the people of this state and has advanced to emergency proportions" and declaring that it is "a necessary governmental responsibility to properly manage and protect Florida's beaches . . . from erosion"); *id.* § 161.101(1) (delegating to DEP the authority to determine "those beaches which are critically eroded and in need of restoration and nourishment"); FLA. ADMIN. CODE R. 62B-36.002(4) (2009) (defining "critically eroded shoreline" as "a segment of shoreline where natural processes or human activities have caused, or contributed to, erosion and recession of the beach and dune system to such a degree that upland development, recreational interests, wildlife habitat or important cultural resources are threatened or lost").

The Florida Supreme Court also unequivocally limited its decision to evaluation of the Act in the context of critically eroded beaches. *See Stop the Beach Renourishment, Inc.*, 998 So. 2d at 1105 ("At the outset, however, we emphasize that our decision in this case is strictly limited to the context of restoring critically eroded beaches under the Beach and

Shore Preservation Act."). It is thus clear that the Florida Supreme Court's decision was not intended to, and does not, reach across various statutory schemes or even to all riparian property.

Second, the Act preserves littoral rights of upland property owners recognized under Florida's common law. FLA. STAT. § 161.201 (preserving "rights of ingress, egress, view, boating, bathing, and fishing"); *id.* § 161.141 (declaring that "there is no intention on the part of the state to extend its claims to lands not already held by it or to deprive an upland or submerged land owner of the legitimate and constitutional use and enjoyment of his or her property").

Third, the Act itself provides just compensation for takings where necessary. *See id.* § 161.141 ("If an authorized beach restoration, beach nourishment, and erosion control project cannot reasonably be accomplished without the taking of private property, the taking must be made by the requesting authority by eminent domain proceedings."). For instance, if the Board were to set the ECL landward of the MHWL, just compensation might be required for the taking of the upland owner's property, as expressly provided by the Act.

Finally, the Act provides substantial benefits both (1) directly to upland property owners and (2) to the public at large. The benefits to waterfront landowners are substantial. Restoration projects protect owners against future erosion which, in the absence of restoration, would move the high water mark upland, reducing the size of the owner's property by moving its boundary inland. The Act also provides

value to owners under § 161.141 (prescribing that "any additions to the upland property landward of the established line of mean high water which result from the restoration project remain the property of the upland owner . . . "). Waterfront owners are also protected with respect to the use of the state's property below the mean high water mark. *See, e.g.*, § 161.201 ("[T]he state shall not allow any structure to be erected upon lands created, either naturally or artificially, seaward of any erosion control line . . . except such structures required for the preservation of erosion."); *id.* ("Neither shall such use be permitted by the state as may be injurious to the person, business, or property of the upland owner or lessee."). "Renourishment" of critically eroded beaches temporarily re-establishes beaches lost and as an interim measure reduces future storm damage to existing structures and further beach erosion.

II. Florida's Beach and Shore Preservation Act Was Not Unconstitutionally Applied Since It Does Not Effect a Taking of Littoral Rights.

A. Under Florida Law, Littoral Rights Are Not Absolute.

Petitioner claims that its members lost two littoral rights—the right of "contact" with the water and the right to accretions and relictions—both of them property rights. However, as the Florida Supreme Court accurately noted, these rights are not absolute. Opin. at 1, 30. The Supreme Court has long so held, and long recognized that riparian rights may be subservient to government necessities. "Under the doctrine of navigational servitude, the Federal Govern-

ment may erect structures or otherwise modify a navigable stream without offering financial compensation to the State or to the owners of the submerged land." *Murphy v. Dep't of Natural Res.*, 837 F. Supp. 1217, 1221 (S.D. Fla. 1993) (citing *United States v. Twin City Power Co.*, 350 U.S. 222, 224 (1956); *Gibson v. United States*, 166 U.S. 269, 272 (1897)); *see also United States v. Willow River Power Co.*, 324 U.S. 499, 511 (1945) ("It would be strange if the State of Wisconsin is free to raise an adjacent land highway without compensation but the United States may not exercise an analogous power to raise a highway by water without making compensation where neither takes claimant's lands, but each cuts off access to and use of a natural level.").

B. The Littoral Rights of Contact and Accretion/Reliction Are Not Implicated.

1. Petitioner Asserts Only Contact and Accretion/Reliction Rights.

Petitioner has not asserted the loss of any littoral rights other than the right of contact and the right to accretion and reliction, because all other littoral rights are maintained under the Act. FLA. STAT. § 161.201 ("Any upland owner or lessee who by operation of ss. 161.141–161.211 ceases to be a holder of title to the mean high-water line shall, nonetheless, continue to be entitled to all common-law riparian rights except as otherwise provided in s. 161.191(2), including but not limited to rights of ingress, egress, view, boating, bathing, and fishing."). By asserting that the application of the Act here divested the upland owners of these two remaining lit-

toral rights, Petitioner effectively seeks not only the benefit of the protection to the upland property against further reduction by erosion (the very purpose of beach restoration under the Act) but also seeks, in effect, ownership of the state's sovereign land, along with any accretion or reliction to *the State's* land—and all at public expense. There is nothing in Florida's prior "100 years" of legal decisions which provides for such a windfall.

2. There Is No Vested Right of "Contact."

a. The Right of "Contact" Is Only Part of the Right to Access, Which Is Unaffected.

A property owner only has "contact" with the water, if at all, at the one moment in time when the shifting tides are at the precise MHWL—the boundary of the owner's property. No one disputes that the right to contact with the water seaward of the MHWL, or at virtually every other moment of tidal movement, belongs to the public.

Courts have generally recognized the right of the upland owner as a right of access that subsumes other attributes, such as bathing and fishing in, and the right to navigation over such waters. *White v. Hughes*, 190 So. at 448. Such common law rights have been recognized as subject to lawful regulation by the sovereign state in the interest of the public and subject to the authority of Congress as to commerce and navigation. *Freed v. Miami Beach Pier Corp.*, 112 So. 841, 844 (Fla. 1927).

Even *Board of Trustees v. Sand Key Assocs.*, 512 So. 2d 934, 936 (Fla. 1987), which Petitioner cites frequently, by recognizing "access to the water, *including* the right to have the property's contact with the water," acknowledges that the right to contact the water is only a part of the right to access—a right which Petitioner's members continue to have here, only not exclusively. *Id.* at 935 (emphasis added). *Sand Key*, however, was not a "contact" case, but an accretion case, where an artificially constructed jetty resulted in natural (gradual and imperceptible) accretion to the upland owner's property, and is therefore a very different case from this one. The Petitioner's citation to the portion of the *Sand Key* decision concerning the right to contact was thus merely dicta. *Id.* at 936.

This Court has previously ruled that littoral rights, at least in the state of Washington, do not include the right to "contact with the water." *Port of Seattle v. Or. & W. R. Co.*, 255 U.S. 56, 64 (1921) ("So complete is the absence of riparian or littoral rights that the State may—subject to the superior rights of the United States—wholly divert a navigable stream, sell the river bed and yet have impaired in so doing no right of the upland owners whose land is thereby separated from all contact with the water.") The Florida cases cited by Petitioner do not even mention the right of contact, but only hold that littoral rights extend to the high-water mark. *See* Petitioner's Br. at 25 & n. 17. Petitioner has cited no case, with the exception of the distinguishable *Sand Key* case, which claims a "right to contact." Pet. Br. at 24–27. This is the fundamental point of Petitioner's argu-

ment, yet it has barely any authority, much less authority on point, for its proposition.

Moreover, there can be no "right to contact" since Petitioner's land, or any other land, rarely if ever contacts the water at the MHWL, which is statutorily defined as the average height of the high waters over a 19-year period. FLA. STAT. § 177.24(14) (2007). Philip Flood, Environmental Manager for the State Bureau of Beaches and Coastal Systems, states that the "mean high water line changes throughout the day, throughout, I guess it changes with various storm events as the beach is in such dynamic area, the mean high water line fluctuates." Tr. at 27:1–4. Thus, the Petitioner's land does not have contact with the defined MHWL since it "changes throughout the day," every day. *Id.*

So there can be no right to literal contact, since it is impossible to have contact except at the one moment when the daily changing MHWL is exactly the 19-year average.[3] *See generally Coastal Petroleum Co. v. Am. Cyanamid Co.*, 492 So. 2d 339, 343 (Fla. 1986) ("The high and low water marks of navigable waters change over time, but these natural changes do not divest the public of ownership of the navigable waters."). By the very nature of having a water mark which varies with the tide, when the water is below the high water mark, a property *cannot* con-

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[3] The mean high water line (MHWL) is a fictional line that is measured by averaging "all high tides over an 18.6 year cycle, as determined by the Department of Commerce, National Oceanic Survey." Joseph J. Kalo et al., COASTAL AND OCEAN LAW CASES AND MATERIALS 43 (2d ed. West Group 2002).

tact the water due to the property boundary terminating at the high water mark. *Bd. of Trs. v. Medeira Beach Nominee, Inc.*, 272 So. 2d 209, 213 (Fla. Dist. Ct. App. 1973) ("Although the mean or high water mark is an average over a number of years, the daily mark of a high tide on the shore gives both the riparian and the public notice of their possible use of the land on either side of the mark. Freezing the boundary at a point in time, such as was done in *Martin* or as is suggested here by the state, not only does damage to all the considerations above but renders the ordinary high water mark useless as a boundary line clearly marking the riparian's rights and the sovereign's rights.").

b. The Public Has a Right of Access to the Water Along the Shore That Is Paramount to Land Owners' Rights.

Contrary to Petitioner's position, beachfront property owners do not have the right to exclude the public from going along the shore to reach the water. Petitioner has cited *Medeira Beach*, 272 So. 2d at 214, for the proposition that beachfront owners have the "exclusive right of access over their own property to the water," but *Medeira* also states that beachfront owners cannot prevent the public from passing along the shore to reach the water. *Id.*; *see generally City of Daytona Beach Shores v. State*, 483 So. 2d 405, 408 (Fla. 1985) (Florida's "public trust doctrine . . . declares that Florida's beach sovereignty lands must be accessible to the public . . . ."). The waterfront property owner retains the right to access over his or her own property, but it does not have the ex-

clusive right to access the water. They share it with the public. *See Sand Key*, 512 So. 2d at 936 ("Riparian and littoral property rights consist not only of the right to use the water shared by the public . . . .").[4] Thus, the waterfront property owner does not have the "exclusive" right to access the water, since the public can go along the shore to have the same access. While Petitioner does have littoral rights to the MHWL, these rights do not extend as far as Petitioner claims.

Petitioner's members still have access to the water, which is the vested right of beachfront property owners. *City of Daytona Beach*, 483 So. 2d at 408. The owners can still walk from their property to the water, without any obstructions or structures being erected. While the distance that a landowner may have to walk to access the water may be increased, this is hardly the type of infringement upon littoral rights that Florida common law has held to be a taking. *Id.* The owners do not have, and have never had, a right to keep the public from accessing beaches. The Florida Constitution explicitly prevents exclusion of the public from the water. FLA. CONST. art. X, § 11. While the owners may have an exclusive right of access *from their own property* to the water, the public still has a right to use that water. Thus, the public's right to access the water is

[4] *Amicus* recognizes that this is dicta in *Sand Key*, but since Petitioner rely so heavily on this statement, it is appropriate that the "flip side" of the statement is relevant as well—while land owners have littoral rights, they do not have "exclusive" rights to the water.

paramount to the Petitioner's rights, not subordinate.

3. The Right to "Accretions and Relictions" Is Not at Issue.

a. The Contingent Right to Accretions and Relictions Does Not Exist Where a Beach Is Restored to Reduce Erosion.

Neither accretion nor reliction, both of them consisting of "gradual and imperceptible" *additions* to shoreline, *see Sand Key*, are implicated here. What we have here is a beach restoration project initiated because of, and to counteract *erosion*, where the shoreline is gradually and imperceptibly reduced—the opposite of accretion or reliction, where the shoreline is gradually and imperceptibly extended. *Anderson Columbia Co. v. Bd. of Trs. of Internal Improvement Trust Fund of State of Fla.*, 748 So. 2d 1061, 1068 (Fla. Dist. Ct. App. 1999) ("Gradual erosion or submergence is accretion in reverse . . . .") (Benton, J., concurring).

Further, none of the four policy reasons for giving littoral property owners a right to accretions apply here. *See Medeira Beach*, 272 So. 2d at 212–213. First, accretion is a *de minimis* act that is a "gradual and imperceptible accumulation of land" and thus not intended to apply here, where the State added a dramatic and perceptible accumulation of land. *Cf. Martin v. Bush*, 112 So. 274, 287 (Fla. 1927) ("The doctrine of reliction is applicable where from natural causes water recedes by imperceptible degrees, and does not apply where lands [sic] is reclaimed by gov-

ernmental agencies as by drainage operations."). Second, the doctrine that he who stands to lose should also gain is inapplicable here since the State stands to both lose and gain land after its perceptible increase to the land. *Medeira Beach,* 272 So. 2d at 214 (noting that Florida statute § 161.051 purports to vest title to accretions caused by public works in the state). Third, all land should have an owner, and the land at issue here is already owned by the State, so it is unnecessary to give ownership to the beach-front owners because it already has an owner. Lastly, the doctrine expanding property ownership to include accreted land is intended to preserve access to the water, which is not applicable here because access is expressly preserved in the Act.

What this case is about is the State's sudden and very perceptible elevation of its own, sovereign land to help protect the shoreline from further erosion. *See Wallace Corp. v. City of Miami Beach,* 793 So. 2d 1134, 1139 (Fla. Dist. Ct. App. 2001) (upholding "re-nourishment" where "the record contains an abundance of competent substantial evidence from which the ALJ could find that the beachwalk project was 'necessary' or 'required' to prevent erosion."). The State undisputedly deemed the beaches at issue here to be "**CRITICALLY ERODED**." Thus, by definition, there are no accretions or relictions involved.

The Florida Constitution explicitly authorizes the government to provide for and preserve its beaches, which is supported by cases interpreting this constitutional provision. FLA. CONST. art. X, § 11; *see, e.g., Trepanier v. County of Volusia,* 965 So. 2d 276, 286 (Fla. Dist. Ct. App. 2007). Since nearly

three-fourths of Floridians live in counties bordering the ocean, this provision is of great importance to the people of Florida. Kenneth E. Spahn, *The Beach and Shore Preservation Act: Regulating Coastal Construction in Florida*, 24 STETSON L. REV. 353, 357 (1995). The State, at public expense, addressed a significant erosion problem for the beaches of Destin and Walton County by following Florida Administrative Code and legislation. It is undisputed that the State properly executed its restoration.

b. The Act Was Applied Here to Restore, by Artificially Avulsive Action, Property Belonging to the State.

The principles on which Petitioner relies to establish a taking come from cases that involve only gradual and imperceptible shoreline changes constituting accretion and reliction. *Sand Key*, 512 So. 2d at 936; *Belvedere Dev. Corp. v. Dep't of Transp.*, 476 So. 2d 649 (Fla. 1985); *State v. Fla. Nat'l Props.*, 338 So. 2d 13, 17 (Fla. 1976). These cases uniformly involve imperceptible changes that move the MHWL seaward. *Id. Sand Key*, on which Petitioner so strongly relies, involved naturally occurring accretion resulting from and occurring after the State had increased its own land through an artificial structure—a "jetty." However, the issue in *Sand Key* was whether the gradual and imperceptible accretions resulting from the creation of the jetty were owned by the State. *Sand Key*, 512 So. 2d at 936. Here, the issue is whether the very sudden and perceptible elevation of the State's sovereign land, below the MHWL (an "avulsive" event artificially created by

the State), preserves the character of that land as state-owned.

There are any number of cases involving avulsive events in which Florida courts have preserved the ownership of sovereign land. *Sand Key*, 512 So. 2d at 936; *Bryant v. Peppe*, 238 So. 2d 836, 838 (Fla. 1970); *Martin*, 112 So. at 284–285; *Trepanier*, 965 So. 2d at 286; *Mun. Liquidators, Inc. v. Tench*, 153 So. 2d 728 (Fla. Dist. Ct. App.), *cert. denied*, 157 So. 2d 817 (Fla. 1963); *Siesta Props., Inc. v. Hart*, 122 So. 2d 218 (Fla. Dist. Ct. App. 1960). The court in *Schulz v. City of Dania*, 156 So. 2d 520, 521 (Fla. Dist. Ct. App. 1963), described the difference between avulsion and accretion/reliction as follows:

> where the loss occurs through avulsion, which is defined as the sudden or violent action of the elements, and the effect and extent of which is perceptible, the boundaries do not change. But where the sea, lake, or navigable stream imperceptibly encroaches upon the land, the loss falls upon the owner, and the land thus lost by erosion returns to the ownership of the State.

Put simply, if there is an avulsive event, the boundaries do not change. Florida's restoration project was, as the Florida Supreme Court properly held, the equivalent of an avulsive event, and as such, the boundaries should not change here, either, with the sovereign land remaining the property of the State.

Thus, the upland owners here have the same rights to accretions and relictions that they did prior to the State's "renourishment." Avulsive events do

not relate to accretions and relictions. The Florida Supreme Court did not overturn "100 years" of Florida common law because this case relates to an avulsion caused by an artificial structure created by the State, and does not relate to "100 years" of law related to accretions or relictions. The State reclaimed its storm-damaged shoreline by re-establishing sand to its submerged sovereign lands. *Bryant*, 238 So. 2d at 838; *see generally* Opin. at 26–27.

The Petitioner seeks to discredit this theory by claiming that the avulsive event is the hurricane that preceded the "renourishment." But Petitioner does not take issue with the setting of the ECL which, because it was set precisely at the MHWL, marks the boundary between the privately and publicly owned land as a matter of law. The State continues to own the land seaward to the ECL, as if the "renourisment" (avulsive event) had never happened, and retains rights to the submerged land that was renourished by the State and made into dry land. *Bryant*, 238 So. 2d at 838 (approving doctrine of avulsion from drainage project undertaken by State) (citing *Martin*, 112 So. at 284–285). *See also Sand Key*, 512 So. 2d at 940 (citing *Martin*, 112 So. at 287) ("If to serve a public purpose the State, with the consent of the Federal authority, lowers the level of navigable waters so as to make the water recede and uncover lands below the original high water mark, the lands so uncovered below such high water mark, continue to belong to the State.").

The State thus took its own submersable land seaward of the MHWL and made it a dry beach as it is entitled to under the avulsion doctrine. The State

owned the submersable land before the "renourishment," and still owns the land after the "renourishment." Lost in the Petitioner's rhetoric is that the state owns land seaward of the MHWL prior to the "renourishment" in trust for all the people under the "public trust" doctrine and still owns this land.

C. Restoring Land Based on an Avulsive Event Is Not a Judicial Taking of Littoral Rights.

1. The Act Is Not a "Sudden Change" in Florida Law.

Petitioner incorrectly claims that the Florida Supreme Court "suddenly and dramatically changed 100 years of background property law in Florida" in asserting that the heretofore unrecognized "judicial takings" doctrine applies here. *Amicus* submits first that Petitioner has incorrectly focused on whether this is a taking of Petitioner's property, when this really is an advancement of the state's constitutionally-protected property rights to hold seaward land in trust for the public. The land defined by the MHWL boundary is subject only to imperceptible movement over time, either landward, due to erosion, or seaward, due to accretion or reliction, neither of them applicable under the Act, which presumptively involves only protection of beaches from erosion.

Florida constitutional law explicitly protects the people's right to the submerged land at issue here, which was dry land prior to the avulsive activity. *White v. Hughes*, 190 So. at 448–449 ("The beach of the Atlantic Ocean between high and low water

marks is the property of the State[.]"); *Freed*, 112 So. at 844 ("[L]ands within the territorial limits of the State below ordinary high water marks of the Ocean and Gulf and other navigable waters, became the property of the State by virtue of its sovereignty."). Even if this is the proper focus of the analysis, Petitioner has failed to demonstrate that the Florida Supreme Court so departed from Florida common law that this amounts to a novel "judicial taking."

And even if the Florida Supreme Court's decision represented an arguable change in law, which it was not, courts and legal scholars have traditionally believed that takings protections do not apply to the courts. *See, e.g.*, Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 517 n. 10 (1986). Justice Brandeis stated that "[s]tate courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guaranties." *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 682 (1930). Justice Cardozo similarly stated nearly 30 years later that "[t]he common law as administered by her judges ascribes to the decisions of her highest court a power to bind and loose that is unextinguished . . . and recognized as law anew." *Great N. Ry. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 365 (1932). As Barton H. Thompson Jr. put it bluntly in his 1990 article, *Judicial Takings*, "by the end of the New Deal, the concept of judicial takings seemed dead. Over and over, federal courts rejected the argument that courts could take property by changing the law." Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1467 (1990) (hereinafter "Thompson").

Although Justice Stewart, in a concurrence in *Hughes v. Washington*, 389 U.S. 290 (1967), argued that the concept of a "judicial taking" existed, no decision of this Court has ever found a "judicial taking" as argued here. Such a finding requires that the lower court's decision "constitutes a sudden change in state law." *Id.* at 296. As shown above, this is not a sudden change in state law, but rather a continuation of Florida common law that places the public good above private interests in accessing beaches and waters. Under the line of Florida cases cited above, *Brannon*, *Florida National*, and *Martin*, as well as the Florida constitution, the state may use its land to advance the public good under the public trust doctrine. Thus, the Act is not a sudden change in Florida law.

2. The Act Is a Continuation of Florida Constitutional and Common Law Rights to Beach Access.

There are two doctrines in Florida that provide a rationale as to why the Act's provisions of beach access to the public would not be a sudden change to Florida law: public trust and custom. The public has a right to access beaches through a public trust. FLA. CONST. art. X, § 11; *Trepanier*, 965 So. 2d at 284 ("The common law public trust doctrine is embodied in Article 10, section 11 of the Florida Constitution. Under that provision, title to the portion of the beach below the mean high water line is held by the state in trust for all the people."). Other states have also held that there is a public trust to provide public access to beaches below the mean high water line. *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d

355, 369 (N.J. 1984) ("[P]rivate land is not immune from a possible right of access to the foreshore for swimming or bathing purposes, nor is it immune from the possibility that some of the dry sand may be used by the public incidental to the right of bathing and swimming."); *Thornton v. Hay*, 462 P.2d 671, 678 (Or. 1969) (holding that continued public use "takes from no man anything which he has a legitimate reason to regard as exclusively his."); *Greater Providence Chamber of Commerce v. State*, 657 A.2d 1038, 1042 (R.I. 1995) (stating that in Rhode Island the "public trust jurisprudence recognizes the unique resource that tidal waters constitute and the necessity that they be held by the sovereign in a trustee capacity for the use and benefit of all citizens"); *Diamond v. State, Bd. of Land and Natural Resources*, 112 Haw. 161, 173–174 (Haw. 2006); *Arrington v. Mattox*, 767 S.W.2d 957, 958–959 (Tex. App. 1989) (the Texas Open Beaches Act does not empower the State to take rights away from a private owner of land, but rather furnishes a means for the public to enforce a historically existing collective right); *Weden v. San Juan County*, 135 Wash. 2d 678, 698, 719 (Wash. 1998) (holding "waters within ordinary high water lines and within the territorial boundaries of the state" are "reserved by a public property interest" for the benefit of all of the public.").

The right to access beaches based on custom has been recognized in Florida for at least thirty-five years. *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 77 (Fla. 1974) (public gained a right to use the dry sand area for usual recreational activities through the customary use of that land without dispute or interruption for many years). The Florida

Supreme Court stated that "[t]he sandy portion of the beaches are of no use for farming, grazing, timber production, or residency—the traditional uses of land—but has served as a thoroughfare and haven for fishermen and bathers, as well as a place of recreation for the public. The interest and rights of the public to the full use of the beaches should be protected." *Id.* This right of custom was upheld in *Trepanier*, 965 So. 2d at 284 ("In Florida, courts have recognized that the public may acquire rights to the dry sand areas of privately owned portions of the beach through the alternative methods of prescription, dedication, and custom.").

In fact, the *Trepanier* court's recognition of the public's right of custom specifically foreclosed the potential "judicial taking" that is claimed here. The court stated, "If the law recognizes that the public has a customary right to drive and park on Appellants' property as an adjunct of its right to other recreational uses of that property, as recognized in *Tona-Rama*, then no takings claim can be made out." 965 So. 2d at 293. In Florida, if there is a right of custom as stated in *Tona-Rama* and heretofore undisputed by any subsequent cases, then there can be no judicial taking since the state's action is not a sudden change of law.

Oregon law on the right of custom allowing beach access is also instructive. Oregon has a long line of case law finding in favor of beach access and against a taking because the custom of Oregonians is to access beaches in that state. *See Stevens v. City of Cannon Beach*, 854 P.2d 449, 454–455 (Or. 1993); *Hay v. Bruno*, 344 F. Supp. 286 (D. Or. 1972); *Thorn-*

ton, 462 P.2d at 676–677. In *Thornton*, the seminal Oregon case on the rights to beach access, the Oregon Supreme Court found that "[t]he dry-sand area in Oregon has been enjoyed by the general public as a recreational adjunct of the wet-sand or foreshore area since the beginning of the state's political history." *Thornton*, 462 P.2d at 673. There was no sudden change of law by the state of Oregon because "this land has been used by the public as public recreational land according to an unbroken custom running back in time as long as the land has been inhabited." *Id.* at 676–677.

Here, both under the Florida constitution and the common law, Florida has a long-running policy of promoting beach access by the public and of allowing the State to use its sovereign lands to promote the public good.[5] Thus, the Act is not a "sudden change" in the law, but instead a continuation of long-standing Florida precedent to a recent development in the state's exercise of its sovereign authority to protect "critically eroded beaches": the ability to dredge submersable land to restore existing beaches to reduce erosion. Florida courts have also recognized that the Act can be used to accommodate new technologies, such as the dredging process used here. *St. Joseph Land & Dev. Co. v. Fla. Dep't of Natural Res.*, 596 So. 2d 137, 139 (Fla. Dist. Ct. App. 1992)

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[5] The record in this case is undeveloped as to the prior customary use of the beaches of Destin and Walton County. *Amicus* submits that the "degree of customary and ancient use" of these beaches is unknown. *Trepanier*, 965 So. 2d at 290. While the State would have the burden of establishing custom, the undeveloped record is further evidence that this Court should not preclude a finding of a right of custom here.

(approving "a comprehensive engineering study and topographic survey that a CCCL [coastal construction control line] is necessary for the protection of upland properties and the control of beach erosion"); *Island Harbor Beach Club, Ltd. v. Dep't of Natural Res.*, 495 So. 2d 209, 217–218 (Fla. Dist. Ct. App. 1986) ("The selection and use of new scientific methodology was a matter of agency discretion that should not be set aside absent a showing that the agency's action is either arbitrary, capricious, an abuse of discretion, or not reasonably related to the statutory purpose.").

There are other problems with finding a "sudden change" via the Act and calling it a judicial taking. If a party, like Petitioner here, could challenge any judicial decision related to property law on the basis that it constituted a "sudden change" in state law, then every such case would turn into a constitutional case. Thompson, *supra* at 1511. There is also the issue of federal courts second-guessing state courts on questions of state property law. *Id.* at 1509. State courts are, and should remain, independent from the federal system of government. *Brinkerhoff-Faris*, 281 U.S. at 680 ("It is true that the courts of a State have the supreme power to interpret and declare the written and unwritten laws of the State; that this Court's power to review decisions of state courts is limited to their decisions on federal questions[.]").

CONCLUSION

For the reasons set forth above, and consistent with its commitment to secure "the right of low-impact, free and open access to the world's oceans, waves and beaches for all people," *Amicus* Surfrider respectfully submits that the decision of the Florida Supreme Court should be affirmed and urges this Court to incorporate into its decision the points that *Amicus* has submitted.

Respectfully submitted,

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